164-702

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~323~~ 8

THE STATE OF WISCONSIN EX REL. JOHN R. BALTZELL, PLAINTIFF IN ERROR,

vs.

ROBERT G. SIEBECKER, CIRCUIT JUDGE OF THE NINTH JUDICIAL CIRCUIT OF THE STATE OF WISCONSIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED OCTOBER 23, 1891.

(14,911.)

(14,911.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 333.

THE STATE OF WISCONSIN EX REL. JOHN R. BALTZELL, PLAINTIFF IN ERROR,

vs.

ROBERT G. SIEBECKER, CIRCUIT JUDGE OF THE NINTH JUDICIAL CIRCUIT OF THE STATE OF WISCONSIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	1½	1
Citation	2	2
Proof of service of citation	3	2
Bond on writ of error	4	2
Caption	6	3
Affidavit for writ of certiorari	7	4
Order for writ of certiorari	11	7
Bond for writ of certiorari	12	7
Writ of certiorari	13	8
Answer or return to writ of certiorari	15	9
Petition	15	9
Objections	20	12
Order granting petition	22	13
Judge's certificate	25	15
Notice of argument	26	15
Notice of argument	27	16
Order beginning argument	28	16
Order concluding argument and taking cause under advisement	28	16
Judgment	29	17
Opinion	29	17
Order on suggestion of death of circuit judge, &c	39	22
Clerk's certificate	40	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 18, 1895.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said supreme court of the State of Wisconsin, before you, between The State of Wisconsin *ex rel.* John R. Baltzell, plaintiff in error, and Alva Stewart, judge of the ninth judicial circuit of the State of Wisconsin, and in which it has been suggested to the said supreme court and entered of record therein that the said Alva Stewart departed this life on the 31st day of December, A. D. 1889, and that Robert G. Siebecker is now appointed and qualified as such circuit judge in his place, manifest error hath happened, to the great damage of the said John R. Baltzell, as by his complaint appears, we, being willing that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, before said court, on the thirty-first day of October, 1891, that, the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the eighth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

F. M. STEWART,
Clerk U. S. Circuit Court, Western Dist. of Wis.

S. U. PINNEY, *Attorney.*

The above writ is allowed by me this 8th day of Oct., A. D. 1891.

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

1½ [Endorsed:] Supreme Court U. S. The State of Wisconsin *ex rel.* John R. Baltzell *vs.* Robert G. Siebecker, circuit judge. Writ of error. S. U. Pinney, attorney.

STATE OF WISCONSIN, *ss:*

Supreme Court.

The return to the within writ appears by the schedule hereto annexed.

The return of the justices of the supreme court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

2 UNITED STATES OF AMERICA, *ss:*

To Robert G. Siebecker, circuit judge of the ninth judicial circuit of the State of Wisconsin, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, on the thirty-first day of October, A. D. 1891, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, wherein The State of Wisconsin *ex rel.* John R. Baltzell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the eighth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

3 [Endorsed:] Supreme Court of U. S. The State of Wisconsin *ex rel.* John R. Baltzell *vs.* Robert G. Siebecker, circuit judge, &c. Citation on writ of error. Service admitted Oct. 9th, A. D. 1891. Robert G. Siebecker, circuit judge, def't in error. S. U. Pinney, att'y.

4 Supreme Court of the United States.

THE STATE OF WISCONSIN *ex Rel.* JOHN R. BALTZELL, Plaintiff in Error,
vs.
ROBERT G. SIEBECKER, Circuit Judge of the Ninth Judicial Circuit of the State of Wisconsin, Defendant in Error.

Know all men by these presents that we, John R. Baltzell, of Madison, Dane county, Wisconsin, as principal, and Elisha Burdick, of Madison, Dane county, Wisconsin, as surety, are held and firmly bound unto Robert G. Siebecker, circuit judge of the ninth judicial circuit of the State of Wisconsin, in the sum of five hundred dollars ($500), to be paid to the said Robert G. Siebecker, his successors or assigns; to which payment, well and truly to be made,

we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this eighth day of October, A. D. 1891.

Whereas the above-named State of Wisconsin *ex rel.* John R. Baltzell has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Wisconsin:

Now, therefore, the condition of this obligation is such that if the said State of Wisconsin *ex rel.* John R. Baltzell shall prosecute said writ of error to effect and answer all costs if it shall fail to
5 make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JOHN R. BALTZELL. [SEAL.]
ELISHA BURDICK. [SEAL.]

STATE OF WISCONSIN, } ss:
Dane County, }

Elisha Burdick, above named, being duly sworn, says that he is a resident and freeholder of the State of Wisconsin, and that he is worth the sum of one thousand dollars ($1,000), in property within this State, over and above all debts by him owing and exclusive of property by law exempt from execution and over and above all exemptions by law.

ELISHA BURDICK.

Subscribed and sworn to before me this 8th day of October, A. D. 1891.

A. L. SANBORN,
Notary Public, Dane Co., Wis.

I approve of the within bond and of the surety thereto as sufficient.

Dated October 8th, 1891.

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

(Endorsed:) Filed October 9, 1891. Clarence Kellogg, clerk of supreme court, Wis.

6 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, the thirteenth day, of August, A. D. 1889.

Present: Orsamus Cole, chief justice; William P. Lyon, David Taylor, Harlow S. Orton, and John B. Cassoday, justices; Clarence Kellogg, clerk.

Be it remembered that heretofore, to wit, on the twenty-eighth day of June, in the year of our Lord one thousand eight hundred

and eighty-nine, came into the office of the clerk of the supreme court of the State of Wisconsin John R. Baltzell, by Messrs. Pinney & Sanborn, his attorneys, and filed in said court his certain affidavit for a writ of certiorari, with the order of allowance endorsed thereon, together with a bond on said writ of certiorari, according to the statute in such case made and provided, in the words and figures following—that is to say:

7 STATE OF WISCONSIN, } ss:
Dane County, }

In Supreme Court.

John R. Baltzell, being duly sworn, says that heretofore and on the 17th day of May, A. D. 1889, George E. Bryant and twenty-five or more other freeholders and owners of lands in said county presented to the Hon. Alva Stewart, presiding judge of the ninth judicial circuit, under the provisions of chapter 383 of the laws of this State for 1889, representing in substance that they are owners of wet and overflowed lands, which, in their opinion, will be benefited by the system of drainage, and subject to the assessment provided for by such act, and that they are of opinion that the public health and welfare will be promoted by such system of drainage, and desire to institute proceedings for the drainage and reclamation of lands in such part of Dane county as shall be affected by said system of drainage, by constructing, extending, opening, enlarging, widening, straightening, and deepening water-courses and removing natural and artificial obstructions therein by permanently lowering the ordinary level of the water in all six of the lakes in said Dane county, commonly known as lakes Mendota, Monona, Waubesa, Kegonsa, Wingra, and Mud lake, and that they apply to the presiding judge of said circuit court for the institution of proceedings under said act, and for the appointment of three commissioners, to be known as drainage commissioners of drainage district number one of Dane county; that the nature of the improvements desired to be made, as near as can be ascertained and specified without preliminary survey, the amount of lands benefited thereby, the benefits to the public health and convenience and to private property which it is believed will result from said system of drainage, which system of drainage is practicable, are that at least thirty thousand acres of wet and marsh lands now useless
8 will be reclaimed and made valuable meadow and pasture land, situated in Dane county, Wisconsin; that the streams and water-courses proposed to be dredged, widened, deepened, etc., are the said six lakes and the Yahara or Catfish river, flowing into and through said lakes, and also the outlet to Lake Wingra and the outlet of the Nine Spring marsh, Door creek flowing into Lake Kegonsa, and also any and all streams which it may be necessary to straighten, dredge, or deepen in order to carry out said system of drainage, which empty into or are tributary to said six lakes or said Yahara or Catfish river; that they propose to lower the ordinary

level of water in Lake Mendota three feet, in Lake Monona two feet, which petitioners believe will not reduce the water in said lakes below their original low-water mark, and the level of the other lakes to correspond therewith; that the principal obstructions to be removed, as far as known to said petitioners, are a certain dam at the outlet of Lake Mendota, in the city of Madison, and a certain dam across the Catfish river, at Stoughton, and also rocks and boulders in said Catfish river; that, in the belief of said petitioners, the costs, damages, and expenses of said system of drainage will be less than the benefits to the owners of lands likely to be benefited thereby; that they believe that the city of Madison will be benefited, as a whole, by said system of drainage by removing from a large amount of wet and overflowed marsh lands in said city stagnant water which is now in the habit of accumulating in said city, rendering a large amount of land in said city unfit for use and affecting the public health of said city as a whole; that they believe that said system of drainage will be for the benefit of the public health by removing large amounts of stagnant water from said lands affected thereby and preventing unhealthy exhalations rising therefrom, both
9 in the city of Madison and other places in said Dane county; that said proposed system of drainage will be for the public convenience and welfare in rendering large amounts of land now useless on account of being overflowed by water fit for pasture and hay land, and in that nearly all the land affected by said system will be especially benefited, and also in improving various streets and public highways in the city of Madison and other places in said Dane county, and praying that an order might be made prescribing the notice to be given of the time and place of hearing said petition, as required by said act, and that such proceedings might be had as were necessary for the appointment of said board of commissioners, as required by said act.

That on said petition an order of said presiding judge appointing the 17th day of June, A. D. 1889, as the time and the chambers of said judge as the place for hearing the matters in said petition, of which notice was duly given by publication, as required by said act; that said hearing was, by order of said judge, postponed until the 24th day of June, A. D. 1889, at the court-house in said city of Madison, and that, at the hearing so appointed on said day, the petitioners appeared, by their attorneys, Rogers & Hall, and this affiant and James Robbins, the owners of said water power and dam in the city of Madison at the outlet of Lake Mendota, mentioned in said petition, appeared, by Pinney & Sanborn, their attorneys, and filed objections in writing to the appointment of any commissioners or the exercise of any authority whatever under the said act of the legislature in said petition mentioned, for the reason that the same, as this affiant and the said James Robbins aver, is unconstitutional and void (1) in that it grants corporate powers and privileges contrary to the amendment of the constitu-
10 tion of Wisconsin of 1871; (2) in that it delegates or attempts to delegate to the commissioners to be appointed under said act power and authority to organize, define, and limit the bound-

aries of the drainage district therein mentioned; (3) in that the said act is an attempt to interfere with private property and private rights, contrary to the law of the land and contrary to the constitution of the State of Wisconsin and of the United States, and (4) in that the act attempts to delegate the power of special taxation to persons not State, county, town, or municipal officers and in no way the choice of or elected by the people, and for other reasons apparent upon the face of the act; and the Stoughton Milling Company appeared by L. K. Luse, its attorney, and filed its objections to the said proceeding substantially to the same effect, and upon the said hearing the said presiding judge made an order appointing Robert G. Siebecker, Frank F. Proudfit, and James Bell commissioners, in accordance with the provisions of chapter 383 of the laws of 1889, and that they give the bond and take the oath required by said act, and upon having given bond and taken such oath that the said Robert G. Siebecker, Frank F. Proudfit, and James Bell be and constitute the said board of drainage commissioners of drainage district number one aforesaid, with all the rights, powers, authority, and duties prescribed and provided in said chapter 383, and that they hold their first meeting on the 29th day of June, A. D. 1889, at the lawyers' room, in the court-house at Madison, Wisconsin, and that the amount of their bond be fixed at five thousand dollars ($5,000).

This deponent further respectfully represents to the court that the said circuit judge had no jurisdiction whatever of the subject-matter of said proceeding, and that said order was and is void by reason of being in excess of the jurisdiction and lawful authority of
11 said presiding judge for the following reasons: (1) In that said act of the legislature grants corporate powers and privileges contrary to the amendment to the constitution of Wisconsin of 1871; (2) in that it delegates or attempts to delegate to the commissioners to be appointed under said act power and authority to organize, define, and limit the boundaries of the drainage district therein mentioned; (3) in that the said act is an attempt to interfere with private property and private rights, contrary to the law of the land and contrary to the constitution of the State of Wisconsin and of the United States, and (4) in that the act attempts to delegate the power of special taxation to persons not State, county, town, or municipal officers and in no way the choice of or elected by the people.

Wherefore this deponent, John R. Baltzell, prays that a writ of certiorari may be issued out of and under the seal of this honorable court in the usual form, directed to the Honorable Alva Stewart, presiding judge of the ninth judicial circuit of this State, commanding him to make return of all and singular the proceedings, papers, orders, and matters aforesaid before him to this court, returnable according to law, to the end that the same may be examined, considered, and reviewed by the court and the same reversed and wholly held for naught.

JOHN R. BALTZELL.

Subscribed and sworn to before me this 28th day of June, A. D. 1889.

A. L. SANBORN,
Notary Public, Dane Co., Wis.

(Endorsed:) Let a writ of certiorari issue on this affidavit, returnable at the first day of next term of court. Madison, June 29, 1889. Orsamus Cole, chief justice of supreme court. Filed June 28, 1889. Clarence Kellogg, clerk of supreme court, Wis.

12 (*Bond.*)

Know all men by these presents that John R. Baltzell, as principal, and A. M. Daggett, as surety, of the city of Madison, Wisconsin, are held and firmly bound unto Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, for the benefit of all persons interested therein, in the sum of two hundred and fifty dollars ($250); to the payment of which, well and truly to be made, we hereby bind ourselves, our executors and administrators, firmly by these presents.

Sealed with our seals and dated this 28th day of June, A. D. 1889.

The condition of this obligation is such that whereas the said John R. Baltzell has applied to the supreme court of the State of Wisconsin for a writ of certiorari, directed to the Honorable Alva Stewart, circuit judge of the ninth judicial circuit in said State, for a review of certain proceedings recently had before him:

Now, if the said John R. Baltzell shall well and truly pay all costs that shall be awarded against him on said writ, then this obligation shall be void; otherwise to be and remain in full force and effect.

JOHN R. BALTZELL. [SEAL.]
A. M. DAGGETT. [SEAL.]

STATE OF WISCONSIN, } ss:
County of Dane, }

A. M. Daggett, being duly sworn, says that he is a freeholder of said State, and that he is worth the sum of two hundred and fifty dollars ($250) in property in this State, exclusive of property exempt from execution.

A. M. DAGGETT.

Subscribed and sworn to before me this 28th day of June, A. D. 1889.

THOMAS A. POLLEYS,
Notary Public, Dane Co., Wis.

13 (Endorsed:) This bond is approved as to form and security. Madison, June 28th, 1889. Orsamus Cole, chief justice of the supreme court of Wis. Filed June 28th, 1889. Clarence Kellogg, clerk of supreme court, Wisconsin.

And thereupon a writ of certiorari was issued out of and under the seal of this court, directed to Alva Stewart, circuit judge of the ninth judicial circuit of Wisconsin, in the words and figures following:

STATE OF WISCONSIN:

In Supreme Court.

STATE OF WISCONSIN *ex Rel.* JOHN R. BALTZELL }
vs.
ALVA STEWART, Circuit Judge. }

The State of Wisconsin to Alva Stewart, circuit judge for the ninth judicial circuit of Wisconsin:

Whereas we have been informed by the affidavit of John R. Baltzell, a certified copy whereof is hereunto annexed, that upon the petition of George E. Bryant and twenty-five or more other freeholders and owners of lands in Dane county, Wisconsin, filed in the office of the clerk of the circuit court for said Dane county on the 17th day of May, A. D. 1889, in accordance with the provisions of chapter 383 of the laws of this State for 1889, such proceedings were had before you that on the 28th day of June, A. D. 1889, you made an order appointing Robert G. Siebecker, Frank F. Proudfit, and James Bell commissioners, to be known as Dane county drainage commissioners of district number one, in accordance with said chapter 383 of the laws of 1889, and ordering that said persons so appointed should give bond as required by said chapter 383, and
that upon their doing so they should be and constitute said
14 board of drainage commissioners of drainage district number
one aforesaid, with all the rights, powers, and duties as provided in said chapter 383 of the laws of 1889;

And whereas it is alleged by said relator, John R. Baltzell, that in said proceedings and in the appointment of said three commissioners, as aforesaid, you proceeded without authority or jurisdiction in the premises, to the great damage of him, the said John R. Baltzell, and that said appointment, as also the said act of the legislature under which said appointment was made, is unconstitutional and void;

And we, being willing to be certified of said appointment by you made and all proceedings upon which said appointment was founded, do command you that you do certify and return unto our supreme court, before our justices thereof, at a general term thereof to be held at the court-room, in the capitol, at the city of Madison, in said State, on the 13th day of August, A. D. 1889, being the second Tuesday of said month, said order of appointment so made by you as aforesaid, together with the said petition, and all proceedings upon which said order of appointment was founded, and all things touching and concerning the same, so that our said court may further act thereon as of right and according to law ought to be done; and have you then and there this writ.

Witness the Honorable Orsamus Cole, chief justice of our said supreme court, at the city of Madison, in the State of Wisconsin, this 28th day of June, A. D. 1889.

By the court:

[SEAL.] CLARENCE KELLOGG, *Clerk.*

(Endorsed:) Circuit court, Dane county, Wis. Filed Dec. 18, 1889. John O'Connell, clerk.

15 And afterwards, to wit, on the twelfth day of July, A. D. 1889, the said writ of certiorari was returned and filed in said court, together with the answer or return of Alva Stewart, circuit judge, &c.; which answer or return is in the words and figures following—that is to say:

STATE OF WISCONSIN:

In Supreme Court.

STATE OF WISCONSIN *ex Rel.* JOHN R. BALTZELL }
vs. }
ALVA STEWART, Circuit Judge. }

To the supreme court of the State of Wisconsin:

By virtue of and in pursuance to a writ of certiorari hereto annexed and to me directed I do hereby certify and return to the said supreme court and the justices thereof that on or about the 17th day of May last the petition of George E. Bryant and twenty-five or more other freeholders and owners of lands in Dane county was presented to me, duly verified; which petition is as follows:

STATE OF WISCONSIN:

Circuit Court, Dane County.

In the matter of the reclamation of certain lands in Dane county and of the appointment of drainage commissioners under chapter 383 of the laws of 1889.

To the Honorable Alva Stewart, presiding judge of said court:

The petition of the undersigned, George E. Bryant, L. D. Stone, Thomas L. Heath, Hiram G. Dodge, S. L. Sheldon, Newell H. Dodge, The City of Madison, Janette Herrick, W. T. McConnell, Halle Steensland, Adam Braem, Henry Harnden, W. D. Bird, John Griffiths, George Soelch, F. A. Bird, D. D. Bryant, Christ. Asbjornson, Stener Halvorson, P. E. Sherlock, Simon Thompson, John Corscot, Ole Wettleson, John Patterson, E. K. Middleberg, J. O. Cold, O. J. Nelson, Ed. Alme, J. A. Quale, Theodore N. Stenehjem, S. C. Omsberg, Oliver Johnson, E. L. Johnson, whose names are hereto subscribed, respectfully represents that your petitioners are owners of wet and overflowed lands which, in the opinion of your petitioners, will be benefited by the system of drainage and

16

subject to the assessment provided for by chapter 383 of the laws of 1889.

That your petitioners are of the opinion that the public health and welfare will be promoted by said system of drainage, and your petitioners desire to institute proceedings for the drainage and reclamation of lands in such part of Dane county as shall be affected by said system of drainage by constructing, extending, opening, enlarging, widening, straightening, and deepening water-courses and removing natural and artificial obstructions therein by permanently lowering the ordinary level of the water in all of the six lakes in said Dane county, commonly known as Lakes Mendota, Monona, Waubesa, Kegonsa, Wingra, and Mud lake; and your petitioners hereby apply to the presiding judge of the circuit court for Dane county for the institution of proceedings under said act and for the appointment of three commissioners, to be known as drainage commissioners of drainage district number one of Dane county.

Your petitioners further specify that the nature of the improvements desired to be made as near as can be ascertained and specified without preliminary survey, the amount of lands to be bene-
17 fited thereby, the benefits to the public health and convenience and to private property which it is believed will result from said system of drainage, which system of drainage is practicable, *is* hereinafter set forth.

That at least thirty thousand acres of wet and marsh lands, which are now useless, will be reclaimed and made valuable meadow and pasture land, which land is situated in Dane county, Wisconsin, and will be directly affected by said system of drainage; that the streams and lakes and water-courses proposed to be dredged, widened, deepened, straightened, and altered in course are the six lakes above set forth and the stream commonly known as the Yahara or Catfish river, flowing into and through said lakes, and the stream serving as outlet to Lake Wingra and that commonly known as the outlet to the Nine Spring marsh and the stream known as Door creek, opening into Lake Kegonsa, and any and all streams which it may be necessary to straighten, dredge, or deepen in order to carry out said system of drainage, which empty into or are tributary to said lakes or to said Yahara or Catfish river.

That your petitioners propose to lower the ordinary level of the water in Lake Mendota three feet and in Lake Monona two feet, which, as your petitioners believe, will not reduce the water in said lakes below their original low-water mark and the level in the other lakes to correspond therewith, and the principal obstructions to be removed, as far as the same are known to your petitioners, are a certain dam at the outlet of Lake Mendota, in the city of Madison; also a certain dam across the Yahara or Catfish river at the city of Stoughton, and also rocks and bowlders in said Yahara or Catfish river.

That in the belief of your petitioners the costs, damages, and expenses of said system of drainage will be less than the benefits which will result to the owners of the land likely to be
18 benefited thereby; that your petitioners believe that the city of Madison will be benefited as a whole by said system of

drainage by removing from a large amount of wet and overflowed marsh lands in said city of Madison stagnant water which is now in the habit of accumulating in said city, rendering a large amount of lands in said city unfit for use and affecting the public health of said city as a whole; that your petitioners verily believe that said system of drainage will be for the benefit of the public health by removing large amounts of stagnant water from said lands affected thereby and preventing unhealthy exhalations rising therefrom, both in the city of Madison and in other places in said Dane county; that said proposed system of drainage will be for the public convenience and welfare in rendering large amounts of lands now useless on account of being overflowed by water fit for pasture and hay land, and that in that manner all the land affected by said system of drainage will be especially benefited, and also in benefiting and improving various streets and public highways in the city of Madison and in other places in Dane county.

Wherefore your petitioners pray that an order may be made prescribing the notice to be given of the time and place of hearing this petition, as required by chapter 383 of the laws of 1889, and that such proceedings may be had as may be necessary for the appointment of said board of commissioners, as is required by said act, and that said board of commissioners may be duly appointed.

ROGERS & HALL,
Attorneys for Petitioners.
H. W. CHYNOWETH,
Of Counsel.

CHRIST. ASBJORNSON.
P. E. SHERLOCK.
JOHN CORSCOT.
JOHN PATTERSON.
HIRAM G. DODGE.
S. L. SHELDON.
NEWELL H. DODGE.
M. R. DOYON,
As Mayor and in Behalf of the City of Madison.
OLE WETTLESON.
JANETTE S. HERRICK,
By M. R. DOYON, *Her Attorney.*
E. K. MIDDLEBERG.
J. O. COLD.
O. J. NELSON.
ED. ALME.
J. A. QUALE.
THEODORE N. STENEHJEM.
S. C. OMSBERG.
OLIVER JOHNSON.
ELI JOHNSON.
GEORGE E. BRYANT.
L. D. STONE.
THOS. L. HEATH.
W. T. McCONNELL.
HALLE STEENSLAND.
ADAM BRAEM.
HENRY HARNDEN.
W. D. BIRD.
JOHN GRIFFITHS.
GEORGE SOELCH.
F. A. BIRD.
D. D. BRYANT.
STENER HALVORSON.
SIMON THOMPSON.

STATE OF WISCONSIN, } ss:
County of Dane, }

George E. Bryant, being duly sworn, on oath says that he is one of the petitioners above named; that he has heard read the fore-

going petition and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

GEORGE E. BRYANT.

Subscribed and sworn to before me this 13th day of May, A. D. 1889.

F. W. HALL,
Notary Public, Dane County, Wisconsin.

(Endorsed:) Circuit court, Dane county, Wis. Filed Dec. 18, 1889. John O'Connell, clerk.

20 That I did thereupon, pursuant to the prayer of said petition, order that said petition and matters therein contained be heard at my chambers, as presiding judge of the circuit court for the ninth judicial circuit, in Brown's block, in the city of Madison, Dane county, Wisconsin, on the 17th day of June, A. D. 1889, at ten o'clock in the forenoon of said day, and that notice of the time and place of hearing said petition and matters therein contained be given to all parties interested by publication of a copy of this order for not less than once each week for four successive weeks before the day fixed for the hearing of this order in the Madison Democrat, a newspaper published in the city of Madison, in said Dane county; that said order and notice was duly published, fixing the time of hearing of said petition at the time and place above stated; that on the said 17th day of June, A. D. 1889, at ten o'clock in the morning of said day, in pursuance of said order and said notice, the said matter of the hearing of said petition came up before me as said presiding judge; that said petition, together with the due proof of said notice, as required by said order, was then and there duly presented and made by Messrs. Rogers & Hall and H. W. Chynoweth, of counsel for said petitioners; that at the same time and place Messrs. Pinney & Sanborn, as attorneys for and in behalf of Robbins & Baltzell, the owners of the Madison mills, and Hon. L. K. Luse, as attorney for and in behalf of the Stoughton mill, and Mr. John M. Olin, in his own behalf, all appeared in opposition to the said petition; that thereupon the said Messrs. Pinney & Sanborn, as attorneys for said Robbins & Baltzell, made and filed the following objections, to wit:

Now comes James Robbins and John R. Baltzell, the owners of the dam and water power at the outlet of Lake Mendota, in the city of Madison, mentioned in said petition, and object to the ap-
21 pointment of any commissioners or to the exercise of any authority whatever under the said act of the legislature in said petition mentioned for the reason that the same, as the said James Robbins and John R. Baltzell aver, is unconstitutional and void:

I. In that it grants corporate powers and privileges contrary to the amendment to the constitution of Wisconsin of 1871.

II. In that it delegates to the commissioners to be appointed

under said act the power and authority to organize, define, and limit the boundaries of the drainage district therein mentioned.

III. In that the said act is an attempt to interfere with private property and private rights, contrary to the law of the land and the constitution of the State of Wisconsin and of the United States.

IV. That the act attempts to delegate the power of special taxation to persons not State, county, town, or municipal officers and in no way the choice of or responsible to the people, and for other reasons apparent upon the face of said act.

And the said L. K. Luse, as attorney for and in behalf of the Stoughton mill, made and filed its objections to said proceedings substantially to the same effect as the objections filed by the said Robbins & Baltzell aforesaid.

That thereupon and thereafter such proceedings were had before me in said matter that on the 28th day of June, A. D. 1889, I made an order granting the prayer of said petition; which order is as follows:

22 STATE OF WISCONSIN:

Circuit Court, Dane County.

In the matter of the reclamation of certain lands in Dane county and of the appointment of drainage commissioners under chapter 383 of the laws of 1889.

The petition of George E. Bryant, L. D. Stone, Thomas L. Heath, Hiram G. Dodge, S. L. Sheldon, Newell Dodge, the City of Madison, Janette S. Herrick, W. T. McConnell, Halle Steensland, Adam Braem, Henry Harnden, W. D. Bird, John Griffiths, George Soelch, F. A. Bird, D. D. Bryant, Stener Halvorson, Simon Thompson, Ole Wettleson, E. K. Midtbaerg, J. O. Cold, O. J. Nelson, Ed. Alme, J. A. Quale, Theodore N. Stenehjem, S. C. Omsberg, Oliver Johnson, Eli Johnson, Christ Asbjornson, P. E. Sherlock, John Corscot, and John Patterson, they being twenty-five and more owners of wet and overflowed lands, representing that fact, and further representing that, in their opinion, said lands will be benefited by a system of drainage and subject to the assessments provided for by chapter 383 of the laws of 1889, and that, in their opinion, the public health and welfare will be promoted by said system of drainage, and that they, the said petitioners, desire to institute proceedings for the drainage and reclamation of lands in such part of Dane county as will be affected by said system of drainage, and asking for the appointment of a board of commissioners as required by said chapter 383, which said petition was and is in all respects in conformity to the said chapter 383 of the laws of 1889, and duly verified by the oath of George E. Bryant, one of said petitioners, and having been, on the 17th day of May, A. D. 1889, duly filed in the office of the clerk of the circuit court for said Dane county, and having been so duly filed as prescribed by said act, as heretofore stated, was duly
23 presented to the presiding judge of the said circuit court for Dane county, the Honorable Alva Stewart, at chambers, and

he, the said presiding judge, did then and there make an order prescribing that notice be given of the time and place of the hearing of said petition to all the parties interested by the publication of such notice in the Madison Democrat, a newspaper published in the said Dane county, once in each week for four successive weeks prior to the 17th day of June, A. D. 1889, at ten o'clock in the morning of said day; said order and notice was published, fixing the time of the hearing of said petition at the chambers of said presiding judge, the said Honorable Alva Stewart, in Brown's block, at the city of Madison, Dane county, Wisconsin, aforesaid, at the time last named, to wit, ten o'clock in the morning of the said 17th day of June, A. D. 1889, and on the said 17th day of June, A. D. 1889, at ten o'clock in the morning of said day, in pursuance to said order and said notice, the said matter of the hearing of said petition came up before the said presiding judge, the Honorable Alva Stewart, and the said petition was then and there presented to the said judge, and due proof of the publication of said notice, as required by said order, was also then and there made and presented, Messrs. Rogers & Hall and H. W. Chynoweth, of counsel for said petitioners, appearing in their behalf, and Messrs. Pinney & Sanborn in behalf of Robbins & Baltzell, the owners of the Madison mills, and L. K. Luse, in behalf of the owners of the mills at Stoughton, and John M. Olin, in his own behalf, in opposition to the said petition, and by consent of all the parties, through their respective attorneys, it was then and there agreed that the said hearing be and the same was held open until Monday, the 24th day of June, at ten o'clock in the morning, at the said judge's chambers and by the order of the said presiding judge; and on said day
24 last named Messrs. Rogers & Hall and H. W. Chynoweth, appearing in behalf of said petitioners, and Messrs. Pinney & Sanborn, representing John R. Baltzell and James Robbins, the owners of the said Madison mills, and L. K. Luse, representing the owners of the said Stoughton mills, appearing in opposition thereto, and after hearing arguments *pro* and *con.*, and the said judge having taken until the next day, to wit, June 25th, A. D. 1889, for the consideration and decision of said motion, and on said last-named day the said presiding judge having decided to grant said order, and now having fixed upon the commissioners herein named, and having at this date ascertained that the gentlemen named will accept: now, on motion of Rogers & Hall and H. W. Chynoweth, attorneys for said petitioners, it is ordered that R. G. Siebecker, Esq., and Frank F. Proudfit, Esq., both of Madison, Dane county, Wisconsin, and James Bell, Esq., of Cottage Grove, Dane county, Wisconsin, who are disinterested and competent freeholders of said county, be, and they are hereby, appointed commissioners, to be known as the Dane county drainage commissioners of drainage district number one, in accordance with the provisions of chapter 383 of the said laws of 1889.

And it is further ordered that said Robert G. Siebecker, Frank F. Proudfit, and James Bell give bond, as required by said chapter 383 of the laws of 1889, in the sum of five thousand dollars each, to be

approved as therein required, and that they take the oath required by said chapter, and that upon so having given the said bond and after taking said oath in full accordance with said chapter, it is ordered that the said R. G. Siebecker, Frank F. Proudfit, and James Bell be and constitute said board of drainage commissioners of drainage district number one, aforesaid, with all the rights, powers, authority, and duties prescribed and provided in said chapter
25 383 of the laws of 1889, and that they shall hold their first meeting on the 28th day of June, A. D. 1889, at the lawyers' room in the circuit court house, in the city of Madison, Dane county, Wisconsin, at two o'clock in the afternoon of said day.

ALVA STEWART,
Circuit Judge.

All of which I do hereby certify and return as within I am commanded.

In testimony whereof I have hereunto set my hand and seal this 12th day of July, in the year one thousand eight hundred and eighty-nine.

ALVA STEWART, *Judge.*

(Endorsed:) Filed July 12, 1889. Clarence Kellogg, clerk of supreme court, Wisconsin. Circuit court, Dane county, Wis. Filed Dec. 18, 1889. John O'Connell, clerk.

26 And afterward, to wit, on the 23d day of July, A. D. 1889, the said relator, by his attorneys, filed in said court his certain notice of argument in the words and figures following:

Supreme Court, State of Wisconsin, Ninth Judicial Circuit, Dane County, August Term, 1889.

STATE OF WISCONSIN *ex Rel.* J. R. BALTZELL, Pl'ff in Error,
against
ALVA STEWART, Circuit Judge, Defendant in Error. } Certiorari.

Please take notice that the hearing upon the writ of certiorari above entitled will be brought on for argument at the next August term of the supreme court of the State of Wisconsin, to be held at the capitol, in the city of Madison, on the 2d Tuesday of August, A. D. 1889, at the opening of the court on that day or as soon thereafter as counsel can be heard.

Dated July 20, 1889.

Yours, &c.,
PINNEY & SANBORN,
Attorneys for Pl'ff in Error.

To Messrs. Rogers & Hall, attorneys for def't in error.

(Endorsed:) We hereby acknowledge due service of a copy of the within notice this 22d day of July, 1889. Rogers & Hall, attorneys for def't in error. Filed July 23, 1889. Clarence Kellogg, clerk of supreme court, Wisconsin.

27 And afterwards, to wit, on the 27th day of July, A. D. 1889, the said defendant in error, by his attorneys, filed in said court his certain notice of argument in the words and figures following:

Supreme Court, State of Wisconsin, Ninth Judicial Circuit, Dane County, August Term, 1889.

STATE OF WISCONSIN *ex Rel.* J. R. BALTZELL, Pl'ff in Error,
against
ALVA STEWART, Circuit Judge, Defendant in Error. } Certiorari.

Please take notice that the hearing upon the writ of certiorari above entitled will be brought on for argument at the next August term of the supreme court of the State of Wisconsin, to be held at the capitol, in the city of Madison, on the 2d Tuesday of August, A. D. 1889, at the opening of the court on that day or as soon thereafter as counsel can be heard.

Dated July 27, 1889.

Yours, &c.,

ROGERS & HALL,
Attorneys for Def't in Error.

To Pinney & Sanborn, attorneys for pl'ff in error.

(Endorsed:) We hereby acknowledge due service of a copy of the within notice this 27th day of July, 1889. Pinney & Sanborn, attorneys for relator. Filed July 27, 1889. Clarence Kellogg, clerk of supreme court, Wisconsin.

28 And afterwards, to wit, at the August term of said court, A. D. 1889, to wit, on the first day of October, A. D. 1889, the same being the eighteenth day of said term, the following proceedings were had in said cause in said court—that is to say:

THE STATE OF WISCONSIN *ex Rel.* JOHN R. BALTZELL,
Plaintiff,
vs.
Hon. ALVA STEWART, Judge, &c., Defendant. } Certiorari.

And now, at this day, came the parties herein, by their attorneys, and the argument of this cause having been commenced by Messrs. S. U. Pinney, A. L. Sanborn, and L. K. Luse, for the said plaintiff, and by Messrs. W. H. Rogers and H. W. Chynoweth for the said defendant, and there not being now sufficient time to complete the same it is continued for further argument.

And afterwards, to wit, at the August term of said court, A. D. 1889, to wit, on the second day of October, A. D. 1889, the same being the nineteenth day of said term, the following further proceedings were had in said cause in said court—that is to say:

THE STATE OF WISCONSIN *ex Rel.* JOHN R. BALTZELL, Plaintiff, *vs.* Hon. ALVA STEWART, Judge, &c., Defendant. } Certiorari.

And now, at this day, came the parties herein, by their attorneys, and the argument of this cause having been resumed and completed, and the court, not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

29 And afterwards, to wit, at the August term of said court, A. D. 1889, to wit, on the fifteenth day of October, A. D. 1889, the same being the twentieth day of said term, the following further proceedings were had in said cause in said court—that is to say:

THE STATE OF WISCONSIN *ex Rel.* JOHN R. BALTZELL, Plaintiff, *vs.* Hon. ALVA STEWART, Judge of the Ninth Judicial Circuit, Defendant. } Certiorari.

This cause came on to be heard on the return to the writ of certiorari heretofore issued herein and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the order of the judge of the circuit court of Dane county made on the 28th day of June, A. D. 1889, in this cause be, and the same is hereby, affirmed.

And that this cause be, and the same is hereby, remanded to the circuit court for Dane county for such further proceedings therein as may be according to law.

Justice Cassoday dissents.

And thereupon the court, by Chief Justice Cole, filed its opinion herein in the words and figures following:

THE STATE OF WISCONSIN *ex Rel.* JOHN R. BALTZELL, *vs.* ALVA STEWART, Circuit Judge, &c.

This is a proceeding to reverse and set aside an order of the circuit judge of Dane county appointing three drainage com-
30 missioners under chapter 383, L. 1889. The validity of this act is challenged on several grounds. In the first place, it is insisted that the act is void because in conflict with subdivision of section 31, art. 4, of the constitution, which prohibits the legislature from enacting any special or private law granting corporate powers or privileges, except to cities. That chapter 383 is a special act, as distinguished from a general law, it seems to me there can be no doubt. In State *ex rel.* Cothren *vs.* Lean, 9 Wis., 270, and in some subsequent cases the words "general law" received a very liberal interpretation, one sufficiently broad to comprehend what some authorities denominate "public local laws," but unless all distinction

between a general law and a special law is broken down I can but think the law in question is a special act. It is entitled An act to amend an act to provide for the drainage and reclamation of certain lands in Dane county, and in its terms applies mainly to lands in that county. I must therefore consider it a special act, intended to accomplish or carry out a local system of drainage.

That the act grants certain corporate powers it seems to me equally plain. Whether those powers are the corporate powers and privileges the amendment of 1871 was intended to prohibit the legislature from granting by a special act is a question which will be considered in a moment; but now, without going into an analysis of the provisions of the act, it is sufficient to remark that the law clearly grants certain corporate powers and privileges, within the meaning of many well-considered cases, to which our attention was called on the argument. The law declares that the commissioners shall be known "as drainage commissioners of drainage district number one of Dane county." They are to take an oath and give bonds for the faithful performance of their duties; cause ac-
31 curate surveys to be made of the route of the proposed system of drainage. After hearing parties interested the board decides whether, in their opinion, the public health or welfare will be promoted by the intended work; if so, they classify lands for the assessment of benefits and taxes to execute the same; assess such benefits and taxes, make contracts, incur obligations, sue and enforce the collection of delinquent assessments, and exercise other corporate powers. They exercise many powers of regular corporate bodies, and the act seems to constitute the drainage commissioners a corporation to accomplish and carry out the work of the proposed system of drainage.

But the counsel for the respondent insist and claim that even if the act does grant certain corporate powers, that they are not of that nature and character which it was the intent of the amendment to prohibit the legislature from granting by a special act. It is said the drainage commissioners are organized as a quasi-corporation for a governmental purpose, in order to execute the police power of the State in a particular district for the promotion of the public health and welfare. It is conceded that the police power of the State extends to the promotion of the health, comfort, and good order of its citizens, and it cannot be successfully denied that drainage laws are enacted mainly to secure these ends. The declared purpose of the law in question is to promote the public health and welfare by executing a system of drainage. That is the main purpose and object of the law. The question as to the validity of drainage laws was fully considered by this court in Donnelly *v.* Decker, 58 Wis., 461. There the town supervisors, under the general statute, had constructed a ditch through the plaintiff's land, and were sued in an action of trespass. This court
32 held that the law providing for the construction of ditches and drains to drain marsh, swamp, and overflowed lands was valid, and that when, in the judgment of the supervisors, such ditches would conduce to the public health and welfare they could

be lawfully made. Without further discussion, it may be assumed that the law in question falls within the police power and the commissioners exercise under it a police authority intended to promote the public health and welfare. The question, then, is, does the constitutional amendment of 1871 prohibit the legislature from granting these powers for such a purpose by special acts? While the question is not free from doubt, we are inclined to the opinion that the legislature had the constitutional power to enact the law. It is certainly well established doctrine that the State constitution is simply a limitation of the power of the legislature, and that in respect to the enactment of laws the legislature has plenary power, except so far as it is restricted in its action by the precise terms of the Federal and State constitutions. It might be difficult to draw an accurate line between the corporate powers and privileges which the legislature is prohibited from granting by special laws and those which they may grant by such laws. No test has been suggested which is entirely satisfactory to our minds. It is said the restriction applies alone to granting powers to private corporations and was not intended to limit the legislature in conferring corporate powers upon quasi-corporations which are political in their character and are agencies for exercising the powers and duties of local government. This view might be adopted as sound were it not for the exception of cities in the clause. There would seem to be no object nor necessity for making the exception if the restriction had no application to a special law conferring corporate powers upon
32 governmental subdivisions of the State, for cities are municipal corporations organized to exercise powers of local government and police regulations. We do not understand that subdiv. 7 of sec. 31, art. 4, has been construed by this court as being a prohibition only as to the grant of corporate powers and privileges to purely private corporations which are organized for private gain, and that it does not apply to quasi-corporations which perform governmental functions. The main object of this clause of the amendment may have been to prohibit the legislature from granting corporate powers and privileges to private corporations except by a general law; but we are not prepared to say that this was the only object of the clause. This provision was not before the court in Smith *v.* Sherry, 50 Wis., 213; Cathcart *v.* Comstock, do., 590; 610, and C. & N. R'y *v.* Langlade, do., 614. We shall not attempt to lay down any general rule which will furnish a test in all cases as to what corporations come within the amendment. It is a safer course to let each law be considered upon its own provisions and subject-matter as it may come before the court. It is sufficient now to say that chap. 383, which organizes the board of drainage commissioners to carry out the prescribed system of drainage in Dane county, is not in conflict with the amendment of 1871. Under the authority conferred the board exercises a police power for the promotion of the public health and welfare and is not clothed with corporate powers or privileges forbidden by the amendment. This same question as to the grant of corporate powers by a special law was involved in Bryant *v.* Robbins, 70 Wis., 258. It is obvious that

if this law is obnoxious to the constitutional objection urged of granting corporate powers which the legislature was prohibited from granting, the law of 1885 was open to a like objection; yet no such objection was taken to the law in that case, although it
34 was argued by the same able and distinguished counsel who assails the law of 1889 on that ground. It may be, as the relator's counsel suggests, that the powers conferred upon the commissioners could have well been exercised by the county board of supervisors. The county board has under the general law power to construct county drains where they will conduce to the public health and welfare—ch. 54, R. S.; but the legislature may have thought the drainage prescribed in the law of 1889 would be more properly and effectually done under the direction of a board of commissioners who would have charge of the work until completed. The county board consists of many members and the personnel is constantly changing. The members are not generally chosen with reference to any peculiar fitness for such work, though they have ample authority under the statute to inaugurate it. But whatever may have been the motive or reason which induced the legislature to enact the law is an immaterial inquiry if the law is valid. The law gives the commissioners, after hearing the parties in the matter who shall appear before them, power to decide whether the public health or welfare will be promoted by the intended work. A favorable decision by them of that question is conclusive. No appeal is granted for any further hearing on the question as to the necessity of the drainage. The law is vigorously assailed because it provides no appeal for the trial of that question. From the nature of the case it would seem that there should be somebody to determine the question of the necessity of the drainage for the public benefit. Is each person whose land is affected by the drainage entitled to a jury trial of the issue? If so, one jury might find one way, another jury find another way, and a marsh which was the cause of sickness and death, and was really a nuisance, would never be drained. The legislature might have declared the marshes in this case a nuisance and
35 taken steps for draining them. The question of necessity could not have been enquired into, except where it was apparent that there was an attempt to evade the constitution and advance some scheme under the pretense of promoting the public health and welfare. In the case of a county drain the county board decides upon the necessity, and there is no appeal from the decision of the question. The principle involved is analogous to taking property by right of eminent domain. Where a municipal corporation takes property for public use the jury conclusively decides the question of necessity. The legislature may determine the necessity of the exercise of the power and the extent to which the exercise shall be carried, or it may delegate the exercise of that right to officers or corporations. "It is not indispensable that the legislature shall determine that any given enterprise is necessary and proper before putting in operation the power of eminent domain. This power is primarily an absolute one, and theoretically exists in this absolute form in the ultimate source of authority in every or-

ganized society. In the constituted government of this State the right of exercising it has been confided to the legislature, restricted by only two conditions—one, that compensation shall be made to the owner of the property taken; the other, that the use for which the property may be taken shall be a public use. In other respects it is without limits. Whether the purpose to be subserved be necessary or wise is for the legislature alone. That body also must decide when or under what circumstances the occasion for its exercise arises, but whether the legislature will await the actual existence of the occasion before determining to employ its prerogative, or will declare in advance what condition of things shall furnish the exigency for its agents to act, is a question purely for legislative discretion." This language of the court of New Jersey in National Docks R'y *v.* Central
36 R'y, 32 N. J. Eq., 55–763, is applicable to the point we are considering. This doctrine is in accord with the views of all the authorities upon the subject and was sanctioned by this court in Smeaton *v.* Martin, 57 Wis., 364; Smith *v.* Gould, 59 do., 631, and Newcomb *v.* Smith, 2 Pinney, 131. It is upon this principle of public benefit that not only the agents of the Government, but also individuals and corporations have been authorized to take or invade private property for the purpose of making highways, turnpike roads, and canals; of erecting and constructing wharves and basins, and of draining swamps and marshes. Hubbell, J., in Newcomb *v.* Smith. No distinction is perceived in the case of taking land for a drain or other public purpose, for while the public have often great interest in drainage on sanitary grounds, this fact furnishes more cogent reasons for the legislature delegating the power of determining whether the necessity exists under the circumstances. It is obvious the question could never be determined by successive jury trials.

Another objection to the law is that it attempts to delegate to the commissioners the power of creating and defining districts for drainage purposes, which, it is said, belongs solely to the legislature. It is not apparent how the legislature could accurately define the boundary of the lands which should be drained without more investigation than it has time to give such matters. As respondent's counsel say, the act does define the boundaries of the district; but it is left to the commissioners to determine what lands shall be drained and what lands shall be charged with assessments for doing the work. But the lands to be drained or reclaimed are in Dane county, and the nature and extent of the proposed drainage are clearly indicated. In Teegarden *v.* Racine, 56 Wis., 545, and
37 Dickson *v.* Racine, 61 Wis., 545, authority was given the common council to define the taxing districts for local taxation, and it was held that the common council possessed *pro hac vice* the legislative power whose action was as conclusive in the matter as if taken by the legislature itself. This is not like People *v.* Parks, 58 Cal., 625. There it is said "the legislature has not, in any of the provisions of the act under consideration, designated any particular river, stream, or locality within the State where drainage was neces-

sary; nor located or established the boundaries of any drainage and assessment district within the limits of which taxes are to be levied, assessed, and collected for the purpose of raising funds to defray the cost and expenses of the system of works designed by the act." P. 641. The legislature could not well enter upon an inquiry of the lands which should be drained, but naturally referred that subject to the commissioners, which could investigate the facts. The commissioners could determine what lands would be benefited by the work and assess the burdens in proportion to the benefits received. We see no objection to this feature of the law. See Cooley on Taxation, 2d ed., page 149, and cases cited in the notes.

It is further insisted that the act is void because it provides a method of drainage which affects property rights without giving the owner of the land the benefit of due process of law. The act gives an appeal from the decision of the commissioners in classifying the lands for assessment; from the amount of damages awarded for any land taken or injured; from the taxes and benefits apportioned; indeed, from the decision of all material questions which can arise, except from the decision as to the necessity of the drainage to promote the public health and welfare. We have stated some reasons for the conclusion that the act is not void for that feature in it; but upon the other questions the aggrieved party has an
38 appeal. Under the circumstances it cannot be truthfully said that a person has had his property taken from him or invaded or burdens imposed upon it without a hearing or due process of law. The plain and declared object of the act is the promotion of the general health of the community and the public welfare by the execution of the proposed system of drainage and the improvement of waste land which will result therefrom. These manifest advantages and benefits, both public and private, would seem to fully justify its enactment. The validity and wisdom of such legislation has been amply vindicated by courts which have considered the subject and no further remarks are called for upon the general question.

As we perceive no valid objection to chapter 383, the order of the circuit court appointing the drainage commissioners is affirmed and the cause is remanded for further proceedings according to law.

39 THE STATE OF WISCONSIN *ex Rel.* JOHN R. BALTZELL
vs.
ALVA STEWART, Judge of the Circuit Court for the Ninth Judicial Circuit, Wis.

And afterwards, to wit, at the August term of said court, A. D. 1891, to wit, on the 29th day of September, A. D. 1891, the same being the eleventh day of said term, comes the said relator, by Pinney & Sanborn, his attorneys, and suggests and gives the court now here to understand and be informed that after the rendition of judgment herein as aforesaid, and on the 31st day of December, A D. 1889, the said Hon. Alva Stewart, circuit judge as aforesaid, departed this life, and that Hon. Robert G. Siebecker was duly appointed

and chosen as and now is his successor in said office; and hereupon the court doth order that the said suggestion be entered of record herein.

(Endorsed:) Filed Sept. 29, 1891. Clarence Kellogg, clerk supreme court, Wis.

40 STATE OF WISCONSIN, *ss:*

Supreme Court.

THE STATE OF WISCONSIN *ex Rel.* JOHN R. BALTZELL }
vs.
ROBERT G. SIEBECKER, Circuit Judge, &c. }

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same, in the above-entitled cause; that the original writ of error, the citation, with its service endorsed thereon, and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

Seal of Supreme Court of Wisconsin.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this 20th day of October, A. D. 1891.

CLARENCE KELLOGG,
Clerk of Supreme Court, Wisconsin.

[Endorsed:] The State of Wisconsin *ex rel.* John R. Baltzell, plaintiff in error. *vs.* Robert G. Siebecker, circuit judge, &c., defendant in error. Return to writ of error.

Endorsed on cover: Case No. 14,911. Wisconsin supreme court. Term No., 333. The State of Wisconsin *ex rel.* John R. Baltzell, plaintiff in error, *vs.* Robert G. Siebecker, circuit judge of the ninth judicial circuit of the State of Wisconsin. Filed October 23rd, 1891.

164-702

164-702

Supreme Court U. S.
FILED.
OCT 1 1896
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 8.

THE STATE OF WISCONSIN EX REL. JOHN R. BALTZELL, *Plaintiff in Error*,

vs.

ROBERT G. SIEBECKER, CIRCUIT JUDGE OF THE NINTH JUDICIAL CIRCUIT OF THE STATE OF WISCONSIN, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

A. L. SANBORN,
Attorney for Plaintiff in Error.

JOURNAL PRINTING CO., PRINTERS AND STEREOTYPERS, MADISON, WIS.

INDEX TO APPENDIX.

ACT OF 1908.

SUPPLEMENTAL ACT OF 1908.

ACT OF 1908.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. —.

THE STATE OF WISCONSIN EX REL. JOHN R. BALTZELL, *Plaintiff in Error*,

vs.

ROBERT G. SIEBECKER, CIRCUIT JUDGE OF THE NINTH JUDICIAL CIRCUIT OF THE STATE OF WISCONSIN, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

This is a writ of error to the supreme court of the state of Wisconsin, to review a final decision of that court deciding in favor of the validity of an act of the legislature of the state of Wisconsin passed in 1889.

The question arising in this case is, whether the act in question is valid, under the Fourteenth amendment of the constitution of the United States. The act was passed for the purpose of procuring the drainage of a large tract of land in Dane county, Wisconsin.

Under the act in question commissioners were appointed by the circuit judge of the Ninth judicial circuit of Wis-

consin, and a writ of *certiorari* was sued out to test the validity of such act of the circuit judge. The supreme court of Wisconsin held the act valid and directed further proceedings to be had.

The attempted drainage of the land in question is a matter which has occupied the attention of the people of Dane county and the local courts for many years. The scheme of drainage was originally one of great apparent importance, but has utterly and absolutely failed in the practical sense, and has been substantially abandoned by the people of the county who are more particularly interested in the matter.

The first act for the drainage of the land in question was passed in 1885.

In 1887 the legislature of Wisconsin amended this act, and provided an act substantially in the same terms as the act of 1889, which is here in question, with one important difference. The act of 1887 provided that there should be a hearing by the circuit court for Dane county upon the question whether the public health and welfare would be promoted by the system of drainage proposed by the act. It was to be a regular judicial hearing, different in no respect from a hearing in equity under the code system prevailing in Wisconsin. A petition was to be filed, notice given, parties in interest were allowed to appear by counsel, the court was to hear the parties and their counsel and the evidence, and make its decision, and such decision was subject to review, as in other cases.

A hearing was had upon the questions involved, and the court decided upon such hearing that the system of drainage would not promote the public health and welfare, and should not be prosecuted. The promoters of the system appealed to the supreme court of Wisconsin, and that court affirmed the decision of the circuit court for Dane county.

Bryant v. Robbins, 74 Wis. 608.

The act of 1889, which is here in question, is substantially reproduced in the appendix to this brief, pages 14–17. The

act of 1885 was substantially the same as the act of 1887, except as to section 4. The act of 1887 provided for a judicial hearing before the court. The act of 1889 provides for a hearing before commissioners only, without appeal, and, as we shall contend, excludes a judicial hearing, and makes the act void, as not affording due process of law.

After the decision by the circuit court for Dane county that the public health and welfare would not be benefited by the drainage of the lands in question, the promoters of the drainage scheme went again to the legislature and procured the passage of the act of 1889. They had found that their scheme could not be supported upon a fair judicial hearing, and that they must adopt some plan by which they could get a decision of some tribunal sustaining their plan of drainage. The courts of Wisconsin had held that their scheme was not justified under the police power, and that the public health and welfare would not be benefited by it. It was therefore incumbent upon them to abandon their plan of drainage, or obtain a decision of some tribunal in favor of the scheme. They therefore conceived the idea of having the question decided, not by the court, but by a commission, consisting of three commissioners, appointed by the local circuit judge, without the necessity of taking evidence, and whose decision in favor of the scheme would be directly and pecuniarily beneficial to the commissioners themselves. In other words, they seemed to think that if it were provided by law that the commissioners should be paid, in case the drainage scheme were entered upon, for their services, and not paid if the commissioners should decide against the application, that a decision would in all probability be in favor of the promotion of the plan.

The promoters of the scheme were justified in their opinion. The legislature passed the act of 1889, differing only from the former acts in the one respect mentioned, that is, that the question at issue should be decided by the commissioners instead of by the court, and such act is reproduced in the appendix to this brief, pages 14–17.

The act substantially provides as follows:

That twenty-five or more owners of wet or overflowed lands which, in their opinion, will be benefited by the system of drainage in question, and who think that the public health and welfare will be thereby promoted, may file a petition for the drainage of lands in Dane county lying along the Madison lakes and extending through the extent of some forty miles along a water-course connecting such lakes. The act provides what the petition shall substantially contain in respect to the situation of the lands, their condition as to being overflowed or otherwise, and other pertinent matters. The petition is to be filed in court, and notice is thereupon to be given of the time and place of the hearing of the petition, by publication in a newspaper published in the county, and upon the hearing of such petition the court or judge is to appoint three disinterested and competent freeholders as commissioners, and fix the time for their first meeting. The commissioners are to take the constitutional oath, and execute bonds for the faithful discharge of their duties and the accounting of all moneys which may come into their hands. Upon the day fixed the commissioners are to meet and qualify; if the petitioners for the drainage of the lands file a bond with the commissioners to pay all expenses incurred in case the commissioners shall decide against the system of drainage, then the commissioners are to proceed to employ engineers and make a preliminary survey and plan, are to give a general notice of the pending of the petition and what is asked by it, and of the time and place of hearing, for three successive weeks, by publication in a newspaper in the county.

Upon the day of the hearing, as specified by the latter notice, the following proceedings were to be had:

"The board of commissioners, after hearing the parties interested in the same who shall appear, shall decide upon said petition, and if they shall be of the opinion that the public health and welfare will be thereby promoted, and shall decide favorably upon the intended work, they shall make an order therefor and cause a further survey to be

made, if necessary, and a map and plan, specifications and estimates thereof to be made, and shall cause such orders, plans, specifications and surveys to be filed with the county clerk of Dane county, who shall keep and file a complete record of all proceedings in said case."

Sec. 4, ch. 383, 1889.

Other sections of the act in question provide for further proceedings to carry out the system of drainage. Surveys are to be made, levels taken, drains and ditches to be made, the lands affected are to be described, and to constitute a drainage district, which is to be a quasi-public corporation, of which the commissioners are to be officers. The expenses of the proceedings, and of the ditching and proposed work, are to be paid by special assessments, to be levied upon the lands in a certain ratio to be decided upon by the commissioners. Taxes are to be levied to pay the special assessments, and, if not paid, the lands are to be sold at tax sale as other lands are for general state and county taxes, tax deeds issued, and like proceedings had as in the case of general taxes.

On the question of the amount of benefits to be assessed to any particular tract of land an appeal is given to a special jury, and from the decision of such a jury a further appeal may be taken to the circuit court for Dane county and thence to the supreme court of the state. Upon such proceedings, however, no other question can be determined except the amount of benefits or damages.

Section 28 of the act provides that the commissioners shall receive $3 per day for the time actually and necessarily employed in the discharge of the duties of their office, to be allowed by the judge of the county or probate court, and paid out of the funds of the district, to be raised by taxation as hereinbefore mentioned.

As has been already stated, the commissioners decided to proceed with the system of drainage, attempted to lay out a drainage district and levy a tax, but, upon *certiorari* proceedings in the local courts, it was decided that their pro-

ceedings were irregular and the special assessment made by them was void on account of such irregularities.

This writ of error was brought to determine the question of the validity of the act under which the drainage district was attempted to be formed and the assessment attempted to be levied, to prevent any further proceedings. If the act is valid, the commissioners may still proceed to lay out another district, and make another assessment, and go on with the work.

In 1893 the legislature of Wisconsin attempted to repeal the act of 1889, here in question, by chapter 142 of the laws of 1893, which is set out *verbatim* in the appendix, pages 18–21. The validity of that act was tested by a *certiorari* proceeding, brought by certain tax-payers and owners of lands affected by the original act and by the act of 1893; and the supreme court of Wisconsin decided that such act of 1893 was unconstitutional and void, on the ground that a tax was thereby levied by special and not general act. The decision of the court is set out in the appendix, pages 21–24.

The relator in this cause is the owner of a water-power upon one of the lakes affected by the system of drainage in question, and the drainage scheme contemplated the condemnation of such water-power and the assessment of damages therefor by the jury, under the provisions of sections 11 and 17 of the act of 1889. He brought his petition for a *certiorari*, alleging that the act in question was unconstitutional and void, on four grounds, one of which was as follows:

"In that the said act is an attempt to interfere with private property and private rights contrary to the law of the land, and contrary to the constitution of the state of Wisconsin and of the United States." (P. Rec., 5, 6.)

ARGUMENT.

I.

A Federal Question, Independently Decisive of the Case, is Presented.

The decision of this constitutional question by the state supreme court was absolutely necessary to a final disposition of the case. Even though it decided all the other objections raised by the relator against him, yet it must also dispose of this one in the same way, unfavorably to him, in order to fully decide the case. The decision of the constitutional question was, in other words, vital to all the parties, fundamental, reaching and covering the whole case. This court, therefore, has jurisdiction.

Cooke v. Avery, 147 U. S. 375.

The right to claim the protection of the fourteenth amendment was expressly set up in the relation, and expressly denied by the supreme court of Wisconsin.

P. Rec. 6, 22; O. Rec. 10, 38.
Roby v. Colehour, 146 U. S. 153.
Brooks v. Missouri, 124 U. S. 394.
French v. Hopkins, id. 524.
Chappell v. Bradshaw, 128 U. S. 132.
Dibble v. Bellingham Bay Land Co., 163 U. S. 63.
Bacon v. Texas, 163 U. S. 207.

II.

The Act of 1889 is Unconstitutional and Void, under the Fourteenth Amendment to the Constitution of the United States.

Section 4 of the act of 1889 is the only one which provides for any notice or hearing upon the decision of the main

question, whether the public health or welfare would be promoted by the drainage scheme. It provides as follows:

"Said board of commissioners, after hearing the parties interested in the same who shall appear, shall decide upon said petition, and if they shall be of the opinion that the public health or welfare will be thereby promoted, and shall decide favorably upon the intended work, they shall make an order therefor." . . .

Objections to this act may be summarized as follows:

The hearing provided for is one only in name, not in substance.

The commissioners are not expressly empowered to take evidence.

They are not authorized to swear witnesses.

They are not authorized to subpœna witnesses.

They cannot compel the production of documentary evidence.

They cannot themselves punish for contempt parties or witnesses, nor by any means procure such punishment by certifying the proceedings to any judicial tribunal.

No appeal from their decision is given.

No possible review of their decision exists. They may decide against all evidence (if they please to receive any), and against the remonstrance of all parties in interest, and still be within the law. *Certiorari*, nor any other remedy, would keep them within any limit whatever, because no limit is defined by the act.

They are judges in their own cause. If they decide to go ahead they are to receive three dollars per day, otherwise nothing.

The contention on the part of the relator is, that the act in question was palpably intended to exclude a judicial hearing, notwithstanding the provisions therein contained for notice and hearing. Giving no appeal from the decision, and the provisions being such that no *certiorari* would lie, the hearing referred to in the act, and expressly provided for, is no hearing at all, but merely a farcical proceeding, plainly intended to avoid the rule of the constitution.

It will be borne in mind that the act of 1887, chapter 525, provided for a judicial hearing in court; that such a hearing had been had, and it had been expressly decided that the public health and welfare would not be benefited by the precise system of drainage here in question. Almost immediately upon the decision of the court the legislature passed the act of 1889, almost identical in all respects, except as to the nature of the hearing. This very important and vital proceeeding was so changed that three commissioners were to be appointed, who were interested in deciding in a particular way, and whose decision was in no manner regulated, limited or restrained, subjected to no rules, surrounded by no restraints of the ordinary judicial kind. If they should be of opinion that the public health or welfare would be promoted by the system of drainage, they might so decide, without any chance of appeal or review whatever.

Evidently the proceeding provided for by section 4 of the act here in question may be anything which the commissioners shall decide to make it. Suppose that all of the persons who appeared before the commissioners should urge upon them to abandon the scheme, and should offer to produce witnesses whose testimony would show that it was impracticable, and that it would be an injury to the public health and welfare. The commissioners might justly say, under the provisions of this act, "We have no power to examine witnesses. We cannot administer oaths. We may simply conduct a town meeting, and decide as we please." Suppose some person appears and requests the commissioners to issue a subpœna to a surveyor, who has made levels and taken surveys of land in and about the proposed district, which it is claimed will show that the scheme is utterly impracticable. Under the law he might be met with the objection that the commissioners could not compel the attendance of a witness, or the production of the minutes of his surveys. Even if the witness should voluntarily appear and testify, and there should be offered in evidence his surveys, and a record of his levels, yet the commissioners might

disregard this evidence, and all other evidence submitted, and might make a decision not based upon any evidence whatever. Under this act such a decision would be just as binding as one based either upon a conflict of evidence, or in conformity with the great preponderance thereof. Inasmuch as no method is provided or exists in the law to correct their errors, or lay down any rules which they must follow, the hearing so provided becomes the merest farce.

These observations are greatly enforced and strengthened by the provision of the section allowing the commissioners $3.00 a day if they shall decide in favor of the scheme, and giving them nothing if they decide the other way. Here is a tribunal whose interest is secured beforehand, which is bound by no rules, subject to no review. The decision which it made affected large interests. Without draining any lands, or in any way commencing the actual work which it was appointed to perform, it incurred an expense of $25,000, and levied an assessment of $100,000. See the opinion of the court in the *certiorari* case of *Turner v. Bell*, appendix, pages 21–24.

The drainage law here in question and other like laws upon the same subject were sustained in their general scope and purpose wholly under the police power. They are not based upon the power of eminent domain, but solely upon the power of the state to protect and secure the public health and welfare.

Donnelly v. Decker, 58 Wis. 461.
Williams v. Town of Yorkville, 59 Wis. 119.
Bryant v. Robbins, 70 Wis. 258.
Bryant v. Robbins, 74 Wis. 608.
State ex rel. Baltzell v. Stewart, 74 Wis. 620.
Town of Muskego v. Drainage Commissioners, 78 Wis. 40.

In Wisconsin a *certiorari* reaches only the acts of inferior courts or bodies acting in a judicial or *quasi*-judicial character, in order to keep such tribunals within their jurisdic-

tional powers. If they decide questions of fact, their decisions cannot be reviewed if there is any evidence whatever to sustain them.

State ex rel. Wiesman v. Keman, 61 Wis. 494.
State ex rel. Foster v. Graham, 60 Wis. 395.

The general principles applicable to the case are entirely familiar to this court, and have been stated as follows:

"Whenever, by the laws of a state, or by a state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

"I think therefore, we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law when a citizen is deprived of his property; and that in judging what is 'due process of law,' respect must be had to the cause and object of the taking — whether under the taxing power, the power of eminent domain or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared not to be 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs and preferences of the people of the particular state may require."

Davidson v. New Orleans, 96 U. S. 97.

The court of appeals of New York has passed upon the question of the character of the tribunal which must be provided for in order that due process of law may be obtained, and has stated the grounds of its decision as follows:

"But, assuming that the act was intended to apply, and retroactive effect be given to it, we are of the opinion that

its material provisions are open to many serious objections, which cannot be obviated or reconciled with the provisions of the fundamental law. A receiver is the representative of the debtor. It is his duty to scrutinize the claims made against the estate, and reject and defend against those he believes to be unfounded or illegal. He cannot be impartial in a litigation between himself and creditors as to such claims. A law, therefore, which makes such a party the referee to take the proof of claims, and the judge to determine the materiality of evidence offered in their support, violates a fundamental rule in the administration of justice. No man can be a judge in his own case; and it is immaterial whether he is a party in his own right or as trustee of an express trust. In either event he is a party to the action, interested therein, and precluded from acting in a judicial capacity in the determination of a case. *Nemo debet esse judex in propria causa.*"

People v. O'Brien, 111 N. Y. 1.

We think that the case is clearly within the ruling of this court in the case of *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, 134 U. S. 418, involving the constitutionality of the Railroad and Warehouse Commission Act of Minnesota. The act was so drawn as to indirectly oust the courts of jurisdiction in respect to the question of railroad rates, and on that ground was held unconstitutional. No method existed by which a railway company could contest the reasonableness of the rates which were to be found by the commission without hearing or notice to the company.

The case of *Mercantile Trust Co. v. Texas & Pacific Railway Co.*, 51 Fed. Rep. 529, in the circuit court for the western district of Texas, is also in point. In that case a notice and hearing were provided for, but the provisions surrounding the proceedings and decision of the commission were arbitrary and burdensome, and it was held that the act establishing the commission and providing for the fixing of rates was void as not affording due process of law.

The citation of authorities might be indefinitely prolonged, but it is thought to be unnecessary. The whole drainage scheme was conceived in private interest, and the passage of

the act in question procured for the purpose of earning fees and providing places for engineers and commissioners. This is clearly apparent from the whole course of the proceedings, as shown in the appendix hereto and the decisions of the supreme court of Wisconsin and the lower court upon these acts. The acts were pernicious in their character, and the proceedings under them were so burdensome that they broke down of their own weight. Large sums of money were expended without any benefit whatever to the territory involved. If the act in question is valid, as affording due process of law, then it is respectfully submitted that the constitutional privilege consists merely in a name. If this act can be sustained, all that is necessary is to provide beforehand for a paid tribunal, whole sole interest is to decide in favor of the proposed scheme, elaborately provide for a notice and hearing, which cannot possibly be reviewed, and proceed to the appropriation of private property for private uses without any semblance whatever of public benefit. That is precisely what was done in this case. In the face of a deliberate and solemn decision of the court, affirmed by the highest court of the state, the legislature passed an act whose provisions were cunningly devised to nullify such decision, and secure the object intended by means essentially unlawful.

In the preamble to the act of 1893, set out in the appendix, the legislature has declared that the drainage scheme is expensive and burdensome, and ought not to be further prosecuted. It is true that the state court has held this act void; but the preamble has the same force, nevertheless, as a joint resolution to the same effect would have.

It is submitted that the decision of the supreme court of Wisconsin ought to be reversed, and the act in question held void.

A. L. SANBORN,
Attorney for Plaintiff in Error.

APPENDIX.

No. 322, S.] [Published May 11, 1889.

CHAPTER 383.

AN ACT to amend chapter 525 of the laws of 1887, entitled "An act to amend chapter 442 of the laws of 1885, entitled 'An act to provide for drainage and reclamation of certain lands in Dane county.'"

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. Whenever twenty-five or more owners of wet or overflowed lands, which, in their opinion, will be benefited by the system of drainage, and subject to the assessment hereinafter provided, and who shall be of the opinion that the public health or welfare will be promoted thereby, shall desire to institute proceedings for the drainage and reclamation of lands in such part of Dane county, either by constructing, extending, opening, enlarging, widening, straightening or deepening water-courses, or removing natural or artificial obstructions therefrom, or by permanently lowering the ordinary level of the water in any or all of the six lakes in said county known as Lakes Mendota, Monona, Waubesa, Kegonsa, Wingra and Mud lake, they may apply to any court of record for Dane county, at any term thereof, or to the presiding judge thereof, by petition, for the institution of such proceedings, and the appointment of three commissioners, to be known as drainage commissioners of drainage district number one of Dane county. Such petition shall specify, in general terms, the nature of the improvements desired to be made, as near as may be, without preliminary survey, the amount of lands to be benefited thereby, the benefits to the public health and convenience, and to private property, which it is believed will result from such system of drainage, and that such system of drainage is practicable. The petition shall also specify, in general terms, the streams, lakes or water-courses proposed to be dredged,

widened, deepened, straightened or altered in course, and the lakes to be lowered, and to what extent, and the principal obstructions to be removed, as far as known to petitioners; and that, in the belief of the petitioners, the costs, damages and expenses will be less than the benefits which will result to the owners of the lands likely to be benefited thereby; and if any town or city, as a whole, will be benefited by such system of drainage, the petitioner may so state, setting forth the nature of such benefits. The common council of the city of Madison may join in said petition in behalf of said city, being thereto first duly authorized by a vote of said town. Said petition may also inform the court of any other matters relative or pertinent to the matter. Such petition shall be verified by the oath of one or more persons, and shall be filed with the clerk of said court.

Section 2. Upon the filing of such petition, the court or presiding judge thereof shall make an order prescribing the notice to be given of the time and place of hearing the said petition, which notice shall be given to all parties interested by publication of the same in one or more newspapers published in said county for not less than once in each week for four successive weeks before the date fixed for the hearing. On presenting such petition, with due proof of publication of the notice as required by said order, the court or presiding judge shall make an order appointing three disinterested and competent freeholders as commissioners, and the said court or judge shall then and there fix the time and place for the first meeting of the commissioners. The commissioners shall, before entering upon their duties, take and subscribe an oath that they will support the constitution of the United States and the constitution of the state of Wisconsin, to faithfully discharge their duties as commissioners to the best of their ability, and vacancies happening in the commission shall be filled in like manner by the said court or judge, and the removal of any commissioner from the county shall vacate his office; and each commissioner shall execute a bond before entering upon the duties of said

office as such commissioner, to be filed with the county clerk as obligee for the benefit of all persons interested, in amount and with sureties to be approved by the court of presiding judge, conditioned to the faithful discharge of his duties as such commissioner and the faithful accounting of all moneys which shall come to his hands as such officer. The county clerk shall, upon the due qualification of the commissioners, issue to them a certified copy of the order for their appointment.

Section 3. Upon the day fixed for the first meeting of said drainage commissioners, said commissioners shall meet at the time and place fixed by said order and shall qualify by taking the requisite oaths and filing the bond required by this act. After said qualification of said commissioners, provided said petitioners shall file with the county clerk a bond to said commissioners with good and sufficient sureties to be approved by said county clerk, conditioned to pay all expenses incurred in case said commissioners shall decide against said system of drainage, said commissioners shall place a copy of the original petition in the hands of some competent engineer to be by them selected, who shall without delay, taking with him the necessary assistants, proceed to make an accurate survey of the route of said proposed system of drainage, and of all the lands tributary to said lakes and to the Catfish river, and which will be affected by said proposed system of drainage, and on the completion thereof shall return to the county clerk a plat and profile of the same, with a description of the proposed route, its availability, and of each separate tract of land through which the drain will pass, or which will be affected by said system of drainage, its situation and level as compared to the adjoining lands, and the obstructions necessary to be removed, and such other facts as he shall deem material, and such specifications as shall be necessary for the construction of the proposed work. Thereupon said commissioners shall cause a notice of the pendency and prayer of said petition, and of the time and place of hearing the same, and a gen-

eral notice of the object of said petition, to be published for at least three successive weeks before said hearing, in some newspaper published in said county.

Section 4. On the day fixed by such notice for the hearing of such petition or on some other day to which such hearing may be adjourned, said board of commissioners, after hearing the parties interested in the same who shall appear, shall decide upon said petition, and if they shall be of the opinion that the public health or welfare will be thereby promoted, and shall decide favorably upon the intended work, they shall make an order therefor and cause a further survey to be made if necessary, and a map and plan, specifications and estimates therefor to be made; and shall cause such orders, plans, specifications and surveys to be filed with the county clerk of Dane county, who shall keep and file a complete record of all proceedings in each such case; and said lands affected by said system of drainage shall be and constitute a district, to be called the First Drainage District of Dane County, and the county clerk shall be clerk of said drainage commissioners of said district. All damages for lands taken for the purposes of said drainage system, and all damages to property of any kind in the reduction or removal of dams or water-powers, may be fixed by agreement between the owner thereof and said board of commissioners, and shall be filed with the county clerk, which agreement shall forever preclude such owner and all persons claiming under him from all further claim for damages. Said drainage commissioners shall make an award in writing of damages to every owner of lands so taken, which shall not have been so agreed upon, and file the same in the office of the county clerk within thirty days after filing the order directing such system of drainage to be made.

(Other sections follow providing for a special assessment, etc.)

No. 135, S.] [Published April 15, 1893

CHAPTER 142.

AN ACT to provide for the payment of the expenses of the Dane County Drainage Commission, and to repeal chapter 383 of the laws of 1889, and the acts amendatory thereof.

PREAMBLE.

Whereas, Commissioners appointed under chapter 383 of the laws of 1889 did decide that the public health and welfare would be promoted by the consummation and completion of the system of drainage mentioned in said act, and said commissioners did incur expenses and liabilities to a considerable amount in proceedings taken under said act, and by an order made November 25, 1891, defined the limits of the drainage district, and referred to certain lands described in the special assessment tax list made by said commissioners, and in which the said order is written; and

Whereas, It has been found that the said system of drainage as provided for by said act of 1889 is expensive and burdensome, and ought not to be prosecuted further, and it appearing that the said expenses and liabilities, or some of them, have been necessarily incurred in the making of surveys, explorations, the taking of necessary levels, and in the procuring of maps, profiles and plans, by means whereof it has been ascertained that the said drainage scheme is expensive and burdensome and ought not to be further prosecuted; and

Whereas, Such expenses and liabilities were incurred in the attempt to improve the public health and promote the general welfare of the people of the drainage district in which the lands to be drained lie, and because thereof an obligation rests upon the people of such district to pay and meet the same; now, therefore,

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. The amount of such expenses and liabilities shall be determined as follows: All persons having any claim

or claims arising in proceedings under said chapter 383 of the laws of 1889, of every kind whatsoever, including claims of holders of bonds issued by said commissioners, the claims of said commissioners for personal services and expenses, claims of clerks, laborers, servants and attorneys for such commissioners and all claims of persons whomsoever, of every kind, may present such claims in the form of a statement of debt or account to the county clerk of said Dane county, within three months from the publication of this act, and said clerk shall file the same in his office. All claims not so presented within said time shall be void. This act shall not be taken as a recognition of the legality or validity of any of said claims, but the same shall be passed upon as follows: The validity of said claim shall be deemed to be denied by the tax-payers affected thereby, and thereupon the circuit judge of the sixth circuit of this state shall fix a convenient time for a hearing upon said claims, at the Dane county court-house, notice of which hearing shall be published in a daily newspaper printed at Madison, in said county of Dane, for ten successive days next prior thereto, and he shall thereupon proceed to take proof of said claims, and decide upon and determine the validity of the same and the amount thereof, and such determination of said judge shall be final and conclusive. To the aggregate amount of such claims so to be allowed there shall be added the necessary and reasonable costs of the proceedings authorized by this act, and the whole amount of said claims and costs shall be certified by said judge to said commissioners, and they shall thereupon proceed as provided in section 2 of this act.

Section 2. The said commissioners are hereby authorized, if they shall so decide, to cause the levy of a uniform tax upon all the real property within the limits of the district so defined in the order of said commissioners made November 25, 1891, and described in a book called the "Drainage Special Assessment Tax List," and upon the personal property of the owners of said real property, taxable within the limits so defined. For that purpose they

may return to the town and city clerks of the towns and cities in which the district lies the proportional amount which such property in each such town or city ought to bear. In order to obtain the respective amounts properly chargeable to such property in each taxing district, they shall ascertain from the last assessment rolls of the towns and cities in which the district lies the whole assessed valuation of all real and personal property subject to taxation within said defined limits, and shall ascertain from said rolls the valuation of such taxable property within said defined limits in each town and city respectively. They shall certify to the respective town and city clerks of such towns and cities the proportion of the whole amount in this act authorized to be paid, which such valuation of such property in each such town or city, respectively, bears to the whole assessed valuation of taxable property within said defined limits, together with a description of the real property in each such town or city within said limits. The said town and city clerks shall thereupon proceed to carry out and extend the sums so certified to them respectively against such real and personal property, as provided in section 1079 of the Revised Statutes, upon a uniform scale, but only against the property in towns or cities respectively which is situated within said defined limits. The said taxes so extended shall be collected in the same manner, and like proceedings shall be had as upon the collection, return, sale of lands and redemption in the case of general taxes, and the town and city treasurers shall pay over the same to the county treasurer as county taxes are paid over, and the said county treasurer shall thereupon pay out the same to the parties entitled thereto under the order of the said circuit judge made upon the allowance of such claims as hereinbefore provided, and the county treasurer shall take receipts therefor for such claimants and file the same in his office.

Section 3. The provisions of chapter 383 of the laws of 1889, entitled "An act to amend chapter 525 of the laws of 1887, entitled 'An act to amend chapter 442 of the laws of 1885,' entitled, 'An act to provide for the drainage and

reclamation of certain lands in Dane county,'" so far only as may be necessary to carry out the provisions of section 2 of this act, and no further, are hereby continued in force. Except as aforesaid, chapter 383 of the laws of 1889, and the act amendatory thereof, are hereby repealed.

Section 4. This act shall take effect and be in force from and after its passage and publication.

NOTE BY THE SECRETARY OF STATE.— The foregoing act having been presented to the governor for his approval, and not having been returned by him to the house of the legislature in which it originated within the time prescribed by the constitution of the state, has become a law without his approval.

T. J. CUNNINGHAM,
Secretary of State.

April 12, 1893.

APPEAL from circuit court, Dane county; GEORGE CLEMENTSON, Judge.

Certiorari on relation of Orlando E. Turner and others against James Bell and others, commissioners of drainage district No. 1, to review and set aside a tax levied by defendants. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is an appeal from the judgment of the circuit court for Dane county upon common-law *certiorari* setting aside a tax levied by the appellants, as commissioners of drainage district No. 1 of Dane county, pursuant to chapter 142 of the Laws of Wisconsin for the year 1893. The appellants were appointed, by the circuit court of Dane county, drainage commissioners, under the provisions of chapter 383 of the Laws of 1889. The object of this chapter was to provide for the drainage and reclamation of a large quantity of overflowed land in Dane county, and it became the duty of the commissioners to make certain preliminary surveys, and, after hearing the parties interested, to determine whether the health and welfare of the public would be promoted by the consummation of the drainage scheme provided in said chapter, and in case they decided favorably it became their duty to make and adopt plans and specifications of the work, and let contracts for the same, and levy special assess-

ments upon the lands reclaimed, to pay for the work. The hearing was had before the commissioners pursuant to this law, and on October 3, 1890, they made an order deciding in favor of the drainage scheme. Thereafter the commissioners incurred considerable expenses, amounting to nearly $24,000, issued and sold bonds to pay part of these expenses, and on the 25th of November, 1891, filed with the county clerk of Dane county an order and list of lands, and declared the list of lands so made to constitute the drainage district. This order and list of lands was made before the commissioners had determined upon any plans, specifications or estimates, as required by the act of 1889. Subsequently, all of the proceedings of the commissioners after the preliminary order of October, 1890, were set aside as void by the circuit court of Monroe county, because the commissioners had included dry upland in the district, and had classified the land according to acreage, and had attempted to change the limits of the drainage district. This judgment was rendered August 1, 1893, upon the writ of *certiorari* sued out by one Hudson. In 1893 the legislature of Wisconsin passed an act to provide for the payment of the expenses of the Dane county drainage commission, and to repeal chapter 383 of the Laws of 1889, which act was published May 1, 1893, and constitutes chapter 142 of the Laws of 1893. This act provides for the ascertainment of the expenses and liabilities incurred by the drainage commissioners, and attempted to authorize the commissioners to levy a uniform tax upon all the real property within the limits of the district defined by the commissioners in the order of November 25, 1891, and upon personal property of the owners of said real property to pay said expenses. It appears that said expenses and liabilities were ascertained under the law, and were found to be $23.584.75, and that the drainage commissioners then proceeded to levy a uniform tax as provided by said chapter 142, to pay said expenses, whereupon the relators, who are the owners of the real estate within the drainage district, sued out their writ of *certiorari*. The case was tried

in the circuit court upon the return to the writ, upon which the facts appeared substantially as above stated, and the circuit court adjudged all of the proceedings of the commissioners, in attempting to levy a tax under chapter 142 aforesaid, unauthorized and void. From this judgment the commissioners have appealed to this court.

A. L. Sanborn, *Frank M. Wootton* and *C. E. Buell*, for appellants. *L. K. Luse*, for respondents.

WINSLOW, J. (after stating the facts). By subdivision 6 of section 31 of article 4 of the constitution, as amended in 1871, the legislature is prohibited from enacting any special or private law for "assessment or collection of taxes." If chapter 142, Laws 1893, contravenes the terms of this prohibition, it is void. That it is a special law cannot be doubted. The original drainage act of 1889, which this act attempts to repeal, was held to be a special law by this court in *State v. Stewart*, 74 Wis. 620, 43 N. W. 947. If that was a special law it needs no argument to demonstrate that the act which repeals it must be also a special law. That it is a law for the assessment and collection of a tax seems equally certain. Its whole object and aim is to provide for the levy and collection of a general tax for the purpose of paying the expenses of the drainage commission. If it is not a law for the "assessment and collection of a tax," then it is nothing. How, then, can it fail to come within the prohibition of the constitution? In reply to this question it is earnestly and ably contended that, because the original drainage act of 1889 was held constitutional, the present act should be so held, because it is an amendment to that act, and the levying of the tax is incidental only. Reliance is placed on the case of *Warner v. Knox*, 50 Wis. 429, 7 N. W. 372. In that case a law authorizing the improvement of certain streets in the city of Milwaukee, and the levy of a special tax therefor, was upheld on the ground that it was, in effect, an amendment to the city charter, granting corporate powers, and that it was within the power of the legislature

under subdivision 7 of said section 31 of the constitution as it then stood. It was there said that the sixth and seventh clauses of the section must be construed together, so as not to make them conflict, and because the legislature might, under the seventh subdivision, amend a city charter, and change or confer corporate powers, such a law was not void because it provided for the levying of a tax to carry such powers into effect. The radical difference between the act under consideration in that case and the one at present involved is apparent at a glance. Had that act repealed the city charter, and abolished the corporation, and then provided for the levy of a tax upon the old territory to pay for something which was never a corporate charge, it would bear some resemblance to the present case. The act under consideration does not attempt to confer any rights or powers save the power to levy a tax. It puts an end to the drainage commission for all purposes, save that it keeps it alive for the single purpose of levying a tax. It must be held a special law for the assessment and collection of a tax, and so in conflict with the constitution and void.

There can be no doubt that upon *certiorari* the proceedings of boards and corporate bodies in levying a tax may be reviewed, and reversed if found void, although great care should be exercised in the issuance of the writ in such cases, and it is frequently refused on the ground of public inconvenience. Nor can there be any doubt but that the court has power, while inquiring into the validity of an act based upon a law which appears upon the statute book, to inquire into and determine the constitutionality of such law. The inquiry in such cases is primarily as to the power of the board or body to act, and this depends upon the validity of the law under which they claim to act. So that, if the court is to determine the primary question, it must necessarily pass upon the validity of the law. The judgment of the circuit court was right. Judgment affirmed.

PINNEY, J., took no part.

164-702

164-702

SUPREME COURT OF THE UNITED STATES

Office Supreme Court, U. S.
FILED
OCT 12 1896
JAMES H. McKENNEY,
CLERK.

OCTOBER TERM, 1896.

NO. 8.

THE STATE OF WISCONSIN, EX REL. JOHN R. BALTZELL,

Plaintiff in Error,

—*vs.*—

ROBERT G. SIEBECKER, CIRCUIT JUDGE OF THE NINTH JUDICIAL CIRCUIT OF THE STATE OF WISCONSIN,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

H. W. CHYNOWETH,
Attorney for Defendant in Error.

CHARLES E. BUELL,
Of Counsel.

MADISON, WIS.:
DEMOCRAT PRINTING COMPANY,
1896.

Supreme Court of the United States.

October Term, 1896.

No. 8.

THE STATE OF WISCONSIN, EX REL. JOHN R. BALTZELL,

Plaintiff in Error,

vs.

ROBERT G. SIEBECKER, CIRCUIT JUDGE OF THE NINTH JUDICIAL CIRCUIT OF THE STATE OF WISCONSIN,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This is a writ of error to the supreme court of the state of Wisconsin, to review a final decision of that court holding valid chap. 383 of the laws of the state of Wisconsin, for the year 1889, which law provided for the drainage and reclamation of certain lands in Dane county in that state.

This law, upon its passage, was vigorously attacked by the learned counsel for the plaintiff in error, and his colleague, now an honored judge of the supreme court

of the state of Wisconsin. After a stubborn fight in the state courts, the supreme court of the state of Wisconsin, at the August, 1889, term thereof, held the law constitutional. State ex rel. Baltzell vs. Stewart, 74 Wis., 620. The portions of the opinion in the above case relevant to the question herein involved, are given in the appendix hereto, pages 28–32. The above decision was rendered October 15, 1889, and this writ of error was sued out October 9th, 1891.

In the meantime, the commissioners had gone on under the law, making surveys, maps, plans and specifications, classifying lands, determining the cost of the proposed drainage, negotiating with owners of mills and mill-dams to be taken under the police power, issuing and negotiating bonds for the payment of the expenses incurred, and to be incurred, and generally carrying out the provisions of the law. Considerable delay was occasioned and much expense incurred by litigation instituted by the plaintiff in error, and others opposed to this law in testing the constitutionality of the law, certiorari proceedings, appeals from awards for damages, etc. Expenses aggregating about twenty-five thousand dollars ($25,000) were incurred, which have been established by a judicial tribunal, under a law providing for the ascertainment thereof.

Much space is taken by the attorney for the plaintiff in error in his brief, showing that certain other laws, in reference to draining the lands of Dane county, differing in some respects from the law under consideration, were, previous to the passage of this law, enacted by the legislature and showing the proceedings had under those laws, and that the legislature attempted, in 1893, to repeal the act of 1889, and provide for the payment of the expenses incurred under this act. It is difficult

to see how the question of whether this law is the best possible law that could be framed, or whether the drainage commissioners erred in judgment in establishing the boundaries of the drainage district, or whether they technically followed the exact provisions of the law in carrying out its details, would affect the constitutionality of the law; nor can the fact that the relator and others opposed to the law have by every known legal device obstructed and impeded the work of the commissioners until those who were in favor of the prosecution of the work, became discouraged at the long delay and great expense incurred (largely in litigation) and asked the legislature to pass the law found in the appendix given in the brief of the plaintiff in error, render it unconstitutional. Nor will the fact that the legislature in attempting, by the law of 1893, to repeal the drainage law and provide for paying the expense incurred, violated the provision of the Wisconsin constitution, prohibiting the enactment of any special law for the assessment of taxes, throw any light upon its constitutionality.

We apprehend that this court will decide the constitutionality of this law upon its merits, without reference to legislation which in no way affects it. And it is submitted that what the circuit court for Dane county may have found, under the law of 1887, upon a hearing of the question of whether the public health and welfare would be promoted, can have no more bearing upon the question of the constitutionality of the law of 1889, where the commissioners based their findings upon the hearing had under that law, than would the findings of a court upon the trial of an issue of fact have upon the findings upon a trial *de novo* of the same issue, by the same or another court. Each tribunal acts upon

the facts and evidence submitted, and it is no impeachment of the integrity of either that its conclusions differ from those of the other.

Lent vs. Tillson, 140 U. S., 316.

It is worthy of note that the same able judge, who found upon the evidence submitted to him, upon the hearing under the law of 1887, that the public health would not be benefited and who had previously held the drainage law of 1887 unconstitutional, held after an exhaustive presentation of the case by the learned counsel for the plaintiff in error, that the drainage law of 1889 here in question, did not violate any provisions of the state or federal constitutions and that this judgment was sustained upon appeal to the supreme court of Wisconsin. It is sufficient in passing to say that it is conceded by the learned counsel for the plaintiff in error, that the law of 1889, under consideration, is with one exception essentially the same as the laws of 1885 and 1887, which were held valid by the supreme court of Wisconsin.

Bryant vs. Robins, 70 Wis., 258.

If the discussion were relevant, an examination of the two laws would show that they differ in more than one respect, and that upon the whole the law of 1889 is more carefully framed to protect the rights of the persons, whose property might be taken, than is the law of 1887, which counsel concedes is constitutional. (See chap. 525, laws of 1887, and chap. 383 of 1889 of state of Wisconsin.)

Disregarding the many irrelevant and immaterial things stated in the learned counsel's brief, the issue narrows itself to the one proposition, whether the pro-

visions of the law of 1889 are such that there is a taking of property "without due process of law" contrary to the inhibition of the 14th amendment to the federal constitution.

Only four sections of this law are printed in the appendix to the brief of the attorney for the plaintiff in error. Other sections giving important provisions, and showing the general scope of the law, are printed in the appendix hereto, pages 14–27.

The objections argued against the law are that it made the commissioners the judges of the question of whether the public health and welfare would be promoted, instead of referring it to a judicial tribunal; that in as much as the future compensation of the commissioners depended upon their finding in favor of the proposed system of drainage, they were not an impartial tribunal; that no appeal was given from their finding upon the question of whether or not the public health and welfare would be promoted; that they were not specifically authorized to subpœna witnesses, take testimony, and compel the production of documentary evidence, and punish as for contempt, a disobedience of their mandates.

From an examination of the whole law, it will be seen that it was framed with great care; that the rights of all persons affected thereby were carefully guarded, and that every person whose property could by any possibility be taken under the law, had an adequate remedy, including the right of appeal from the determination of the commissioners, trial by jury, and appeal to the supreme court, as well as the remedies of certiorari and injunction, which the relator and others have so freely used.

After the commissioners had determined that the

public health and welfare would be promoted, they were required to make a further survey, map, plan and specifications, an estimate of expense, to agree if possible with the owners of any property taken, or damaged by reason of the drainage of said district, as to the compensation to be paid therefor, and in case of not being able to agree, to make an award therefor, to classify the land and make special assessments according to benefits, upon a graduated scale, to give personal written or printed notice to all persons of the time and place, when and where, the commissioners would meet to hear objections that might be made to the classification of benefits, to hear all objections, and to correct the classification if injustice had been done, and to levy an assessment to carry out the provisions of the law, to publish notice of the time and place, when and where all contracts for doing the work would be let, and to carry out in detail, the provisions of the law. Each commissioner had to take and subscribe a constitutional oath of office, to give adequate bond for the faithful discharge of the duties imposed upon him, and was under penalty of $100.00 if he neglected his duty. Appeal was given from every determination of the commissioners, except from the one question of whether or not the public health and welfare would be promoted by the drainage of the lands in question. As ex-Chief Justice Cole says in delivering the opinion, sustaining the validity of this law, in State ex rel. Baltzell vs. Stewart supra, "Under the circumstances, it cannot be truly said that a person has had his property taken from him or invaded, or burdens imposed upon it, without hearing or due process of law."

"The plain and declared object of the act is the promotion of the general health of the community, and the

public welfare, by the execution of the proposed system of drainage, and the improvement of waste land, which will result therefrom. These manifest advantages and benefits, both public and private, would seem to fully justify its enactment. The validity and wisdom of such legislation has been amply vindicated by courts, which have considered the subject, and no further remarks are called for upon the general question."

Much stress is laid by the attorney for the plaintiff in error upon the fact that the commissioners who determined the question of whether or not the public health and welfare would be promoted, were interested parties, in that their compensation depended upon their finding in favor of the proposed drainage.

The law provided that these commissioners should be appointed by a court of record, or the presiding judge thereof. They were appointed by the presiding judge of the circuit court of Dane county, said court being the court of general jurisdiction. It is not to be presumed that the court would appoint men who would "disregard their oath of office, and "simply conduct a town meeting and decide as we (they) please" and disregard this evidence and all other evidence submitted, and might make a decision not based upon any evidence whatever" as argued by the learned counsel. The presumption is that the court would appoint upon the commission men of ability, integrity and experience, and that they would perform the duties devolving upon them impartially and faithfully. That the presumption is well founded, is shown by the fact that the late Judge Stewart appointed upon this commission, an able lawyer, (the present honored judge of the ninth judicial circuit) and two practical business men of large experience, one of whom soon after was appointed

assistant state treasurer of Wisconsin. No word of complaint has ever been heard that the commissioners were not men of absolute integrity, of ability and experience; and in view of the safeguards that were thrown around their appointment, of the presumptions that existed as to their doing their duty, of the character of the men likely to be appointed, this court will not presume that they would be influenced in their decision by the meager salary of three dollars per day, which each commissioner would receive "for the time actually and necessarily employed in the discharge of the duties of his office," especially when it is remembered that the petitioners, who asked for the appointment of the commissioners, had to give bond for the payment of all expenses attending the preliminary surveys and hearing of the question of whether or not the public health would be benefited, including the fees of the commissioners in case the commissioners should decide against them, and in view of the further fact that the services of men of the ability and standing of those who would be likely to be appointed commissioners, are presumed to at least equal the salary paid. A similar question was raised in the case of Harrington vs. Smith, 28 Wis., 43 (69), and is thus disposed of by Chief Justice DIXON: "It was suggested on the argument that the the opinions and advice of the attorneys general should be disregarded, because they were influenced by the fees to be obtained from issuing the certificates. It cannot be supposed that those officers could be influenced by any such paltry and unworthy consideration."

This court passed upon a similar point to the one here involved in *Lent vs. Tillson, supra*, where the mayor of San Francisco was appointed upon a commission to

widen Dupont street. It was urged that the mayor was disqualified by reason of interest, from acting as a commissioner, on account of his owning a lot on the street to be widened, that the commissioners made their award of damages upon the opinions of experts called in by them without verifying their estimates, that the appraisement and assessment were fraudulent in fact, but it was held that these did not involve federal questions and that this court was concluded by the findings of the supreme court of California.

The error into which the learned counsel for the plaintiff in error has fallen is in supposing the determination of the question whether or not the public health and welfare would be promoted is *judicial* rather than *legislative*. That the power to determine the necessity of draining wet swamp lands is a part of the police power and that it rests with the legislature of each state to determine what conditions are dangerous to the public health and welfare, and that this power may be exercised by the legislature, sitting as such, or delegated by it to some tribunal to determine the necessity for calling it into existence has been many times decided by this and other courts.

The recent case of *Paulson vs. City of Portland*, 149 U. S., 30, would seem to be decisive of the present case. In that case the common council of the city of Portland, Oregon, under a provision in the city charter authorizing it, passed an ordinance without notice to any one establishing a sewer district; by another ordinance the common council, without notice, appointed three persons viewers to estimate the proportionate share of the cost of said sewer to be assessed to the owners of the property included within the sewer district, but neither the city charter, nor either ordinance expressly pro-

vided for giving notice by the viewers of the time and place of their meeting, but they did in fact publish notice and a majority of the supreme court of Oregon held that the city charter impliedly required notice and that the notice given was sufficient. This court held the act of the city council in passing the ordinance establishing the sewer district a valid legislative exercise of the police power, that upon the question of whether notice was provided for in the city charter this court was bound by the holding of the state court and that there was due process of law. Mr. Justice BREWER speaking for the court says: "But what was in fact done by the city? By ordinance 5068 it ordered the construction of a sewer and directed what area should be drained into that sewer, and created a taxing district out of that area. For these no notice or assent by the tax payer was necessary. A sewer is constructed in the exercise of the police power for the health and cleanliness of the city and the police power is exercised solely at the legislative will. So also the determination of a territorial district to be taxed for a local improvement is within the province of a legislative discretion."

"It is settled that if provision is made for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

In *Kelley vs. Minneapolis*, 57 Minn., 294, where the grade of a street had been changed without notice and commissioners were appointed without notice to assess the damages and no appeal was given from the action of the common council in changing the grade or appointing the commissioners, this was held not to be taking

property without due process of law. See also *County of Hennepin vs. Bartleson*, 37 Minn., 343, and *State vs. District Court of Ramsey County*, 33 Minn., 295.

If the question of determining when the police power shall be called into existence is legislative then the legislature might rightfully determine what tribunal or body should decide upon the necessity of instituting the proposed system of drainage and might also provide that its findings should be final. It is not necessary that it should issue subpœnas, administer oaths, examine witnesses, require the production of documents or punish for contempt a disobedience of its mandates. It proceeds in the best practicable manner to determine the necessity of carrying out the will of the legislature and in accordance with legislative direction. Upon this question and also upon the question of what constitutes "due process of law," see

State ex rel. Baltzell vs. Stewart, supra.
National D. R. Co. vs. Central R. Co., 32 N. J. Eq., 755.
Davidson vs. New Orleans, 96 U. S., 97.
Lent vs. Tillson, supra.
Murray's Lessee et al vs. Hoboken Land and Improvement Co., 18 How., 272.
McMillen vs. Anderson, 95 U. S., 37.
Walker vs. Sauvinet, 92 U. S., 90.
Kelley vs. Pittsburg, 104 U. S., 78.
Pearson vs. Yewdall, 95 U. S., 294.
Ex Parte Wall, 107 U. S., 265, (289).
Matter of Meador, 1 Abb. (U. S.), 317.
Missouri vs. Lewis, 101 U. S., 22.
Griffin vs. Mayer &c., 4 N. Y., 419.

Wilson vs. Board of Trustees of Sanitary District of Chicago, 27 N. E. Rep., 203.
Reeves vs. Treasurer of Wood Co., 8 Ohio St., 333.
O'Reiley et al. vs. The Kankakee Valley Draining Co., 32 Ind., 169.
In re Madera Irrigation District, 92 Cal., 296.

Even were it conceded (as it is not) that this is judicial, rather than a legislative, function many of the objections urged by the learned attorney against this law are not well taken. It is true that the law does not in express terms authorize the commissioners to take testimony, to subpœna witnesses, to require the production of documentary evidence and to punish for contempt a disobedience of its orders, but it does not follow that such power no where exists. The law itself provides that the act shall be liberally construed for the purpose of promoting the objects stated. Everyone interested has a chance to appear and be heard upon the question of whether the public health and welfare will be promoted. A liberal construction of the law would enable the commissioners to take testimony upon this question; the provisions of the statutes of the state of Wisconsin are ample to compel the attendance of witnesses before the commissioners upon subpœna issued

by any officer authorized by law to issue a subpœna; the production of books, papers and other documentary evidence could be compelled by a *subpœna duces tecum* while a court of competent jurisdiction would have power to punish one who should refuse to obey the subpœna. Sections 4053 and 4066, Sanborn & Berryman's Annotated Statutes of Wisconsin.

In many respects the commissioners were better prepared to determine the question of whether or not the public health and welfare would be promoted and whether or not the drainage of these lands would be practicable, than would the legislature or a court sitting to try that issue. The commissioners not only were required to give a hearing, upon notice, at which all parties interested could be heard and, as we think, compel the attendance of witnesses and the production of documentary evidence, etc., but they were required before determining the question, to employ a competent engineer, who should make a careful survey of the tract and would furnish them with maps and much valuable information. Not only this but it is to be presumed that commissioners would do, just what these commissioners in fact did, make a personal examination of the proposed drainage district and satisfy themselves in this way, as no testimony, expert or otherwise, could do, that the proposed drainage would, or would not, promote the public health and welfare and was, or was not, practicable. Considering the many safeguards surrounding their appointment, considering the presumed ability, integrity, experience and impartially of the commissioners no tribunal could be suggested more capable of determining the questions involved, or whose

determination would be less liable to be influenced by unworthy motives.

This writ of error was not sued out until a few days before the expiration of two years from the rendition of the judgment sought to be reversed. It is now seven years since this judgment was rendered. Innocent persons have invested their money in the bonds issued by the drainage commissioners upon the strength of the decisions of the circuit and supreme courts of the state of Wisconsin that the drainage act of 1889 violated no provisions of the state or federal constitutions. Many persons have rendered services for the drainage commissioners, believing, as they had a right to, that this law was constitutional; and their claims have been established by a legal tribunal. It was the duty of the relator to proceed promptly if he desired to avail himself of the remedy of bringing this case by writ of error to this court, knowing that innocent persons were every day acting upon the solemn adjudication of what they supposed to be the court of last resort, that this law was constitutional; and that there was such great delay in taking this appeal and in bringing it to a hearing is a fact which this court may well consider in determining whether or not the judgment of the supreme court of Wisconsin should be reversed.

Paulson vs. City of Portland, supra.

It is submitted that the law in question is one which the legislature of the state of Wisconsin might rightfully enact; that it is an exercise of the police power,

that any property taken, or burden imposed, is for the benefit of the public health; that adequate compensation is provided for any property taken or damaged; that every person whose property might be taken, or assessed to pay the expenses incurred, had a hearing, upon personal notice, before a tribunal which the highest court of the state of Wisconsin has said was fair and impartial and that an appeal and trial by jury were given in every such case. Under the many decisions of this and other courts such a statute cannot be one which contravenes the provisions of the fourteenth amendment.

It is submitted that the judgment of the supreme court of the state of Wisconsin was right and should be affirmed.

H. W. CHYNOWETH,
Attorney for Defendant in Error.

CHAS. E. BUELL,
Of Counsel.

APPENDIX.

(No. 322, S.) (Published May 11, 1889.)

CHAPTER 383.

AN ACT to amend chapter 525, of the laws of 1887, entitled, "An act to amend chapter 442, of the laws of 1885, entitled an act to provide for drainage and reclamation of certain lands in Dane county.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Whenever twenty-five or more owners of wet or overflowed lands, which, in their opinion, will be benefited by the system of drainage, and subject to assessment hereinafter provided, and who shall be of the opinion that the public health or welfare will be promoted thereby, shall desire to institute proceedings for the drainage and reclamation of lands in such part of Dane county, either by constructing, extending or deepening, enlarging, widening, straightening or deepening water-courses, or removing natural or artificial obstructions therefrom, or by permanently lowering the ordinary level of the water in any or all of the six lakes in said county known as lakes Mendota, Monona, Waubesa, Kegonsa, Wingra, and Mud Lake, they may apply to any court of record for Dane county, at any term there-

of, or to the presiding judge thereof, by petition, for the institution of such proceedings, and the appointment of three commissioners, to be known as drainage commissioners of drainage district number one of Dane county. Such petition shall specify, in general terms, the nature of the improvements desired to be made, as near as may be, without preliminary survey, the amount of lands to be benefited thereby, the benefits to the public health or convenience, and to private property, which, it is believed, will result from such system of drainage, and that such system of drainage is practicable. The petition shall also specify in general terms, the streams, lakes or water-courses proposed to be dredged, widened, deepened, straightened or altered in course, and the lakes to be lowered, and to what extent, and the principal obstructions to be removed as far as known to petitioners; and that in the belief of the petitioners, the costs, damages and expenses will be less than the benefits which will result to the owners of the lands likely to be benefited thereby; and if any town or city, as a whole, will be benefited by such system of drainage, the petitioner may so state, setting forth the nature of such benefits. The common council of the city of Madison may join in said petition in behalf of said city, and town board may join in the same, being thereto first duly authorized by a vote of said town. Said petition may also inform the court of any other matters relative or pertinent to the matter. Such petition shall be verified by the oath of one or more persons, and shall be filed with the clerk of said court.

SECTION 2. Upon the filing of such petition, the court or presiding judge thereof, shall make an order prescribing the notice to be given of the time and place of hearing the said petition, which notice shall be given to

all parties interested, by publication of same in one or more newspapers published in said county for not less than once in each week for four successive weeks before the date fixed for the hearing. On presenting such petition with due proof of publication of the notice as required by said order, the court or presiding judge shall make an order appointing three disinterested and competent freeholders as commissioners, and the said court or judge shall then and there fix the time and place for the first meeting of the commissioners. The commissioners shall, before entering upon their duties, take and subscribe an oath that they will support the constitution of the United States and the constitution of the state of Wisconsin, to faithfully discharge their duties as commissioners to the best of their ability, and vacancies happening in the commission shall be filled in like manner by the said court or judge, and the removal of any commissioner from the county shall vacate his office; and each commissioner shall execute a bond before entering upon the duties of said office as such commissioner to be filed with the county clerk as obligee for the benefit of all persons interested, in amount and with sureties to be approved by the court or presiding judge, conditioned to the faithful discharge of his duties as such commissioner and the faithful accounting for and application of all moneys which shall come to his hand as such officer. The county clerk shall, upon due qualification of the commissioners, issue to them a certified copy of the order for their appointment.

SECTION 3. Upon the day fixed for the first meeting of said drainage commissioners, said commissioners shall meet at the time and place fixed by said order and shall qualify by taking the requisite oaths and filing the bond required by this act. After said qualification

of said commissioners, provided said commissioners shall file with the county clerk a bond to said commissioners with good and sufficient sureties to be approved by said county clerk, conditioned to pay all expenses incurred in case said commissioners shall decide against said system of drainage, said commissioners shall place a copy of the original petition in the hands of some competent engineer to be by them selected, who shall without delay, taking with him the necessary assistants, proceed to make an accurate survey of the route of said proposed system of drainage, and of all the lands tributary to said lakes and to the Catfish river, and which will be affected by said proposed system of drainage, and on the completion thereof, shall return to the county clerk a plat and profile of the same, with a description of the proposed route, its availability, and of each separate tract of land through which the drain will pass, or which will be affected by said system of drainage, its situation and level as compared with adjoining lands, and the obstructions necessary to be removed, and such other facts as he shall deem material, and such specifications as shall be necessary for the construction of the proposed work. Thereupon said commissioners shall cause a notice of the pendency and prayer of said petition, and of the time and place of hearing the same, and a general notice of the object of said petition, to be published for at least three successive weeks before said hearing, in some newspaper published in said country.

SECTION 4. On the day fixed by such notice for the hearing of such petition or on some other day to which such hearing may be adjourned, said board of commissioners, after hearing the parties interested in the same who shall appear, shall decide upon said petition, and

if they shall be of the opinion that the public health or welfare will be thereby promoted, and shall decide favorably upon the intended work, they shall make an order therefor and cause a further survey to be made if necessary and a map and plan, specifications and estimates thereof to be made, and shall cause such orders, plans, specifications, and surveys to be filed with the county clerk of Dane county, who shall keep and file a complete record of all proceedings in each such case; and said lands affected by said system of drainage shall be and constitute a district to be called the first drainage district of Dane county, and the county clerk shall be clerk of said drainage commissioners of said district. All damages for lands taken for the purpose of said drainage system and all damages to property of any kind in the reduction or removal of dams or waterpowers may be fixed by agreement in writing between the owner thereof and said board of commissioners, and shall be filed with the county clerk, which agreement shall forever preclude such owner and all persons claiming under him from all further claim for damages. Said drainage commissioners shall make an award in writing of damages to every owner of lands so taken, which shall not have been so agreed upon, and file the same in the office of the county clerk within thirty days after filing the order directing such system of drainage to be made.

SECTION 5. As soon as the plans for the work have been determined, the commissioners shall proceed to make special assessments for benefits by classifying the lands in the districts in tracts of forty acres, more or less, according to the legal or recognized subdivisions on a graduated scale, to be numbered according to the benefits to be received by the contemplated drainage.

The tracts of land which will receive most and about equal benefits shall be marked "one hundred," and such as are adjudged to receive less benefits shall be marked with a less number, denoting its per cent. of benefit. This classification, when established, as hereafter provided, shall remain as a basis for such levy of taxes as may be needed for the lawful and proper purposes of the drainage district.

SECTION 6. The commissioners shall cause to be personally served upon all parties owning land to be affected by the proposed work, or other property liable to be taxed under this act, and residing in the county, a written or printed notice of the time when, and place where they will meet to hear any and all objections that may be made to the classification of lands on the graduated scale, which notice shall be served, in case of residents in the county, not less than ten days before the time set for hearing, and in the same manner as is provided by law for service of summons in circuit court; and the commissioners shall cause to be sent by mail such notice to all owners who do not reside in the county, whose land is to be affected, in case their post-office address is known to the commissioners, or any of them, or can be ascertained by use of reasonable diligence; and in case the land of any non-resident is to be affected, then publication shall be made in some newspaper published in said county, for three successive weeks prior to the time of such hearing, and such meeting to hear objections may be adjourned from day to day by public announcement of the commissioners, made at the meeting until all objections are heard; and all persons duly notified of the first day of meeting, as hereinbefore provided in this section, shall take cognizance of all such adjournments without further noti-

fication. The affidavit of any creditable person or persons that he has or they have posted such notices hereinbefore required, and the certificate of the publishers of such newspaper as to such publication, shall be prima facie evidence of such facts.

SECTION 7. At the time of meeting for review the commissioners shall hear whatever objections may be urged by any person interested, and if satisfied that any injustice has been done in the classification of the several tracts of land, or any of them, they shall correct the same in accordance with what is right; but if not so satisfied, they shall leave the classification as first made and enter an order to that effect. Any person appearing and urging objections, who is not satisfied with the decision of the commissioners may appeal from their decision as hereinafter provided within ten days after the decision of the commissioners was rendered, by filing with the county clerk a notice of appeal and bond with security to pay such tax as may finally be levied upon the land in question and the costs occasioned by the appeal, in case the commissioners shall be sustained. The appeal shall contain a description of the lands, the classifications, as determined by the drainage commissioners and shall fix a certain time and place, not less than six nor more than ten days after the date of the filing thereof, at which the appellant will apply to the county judge for a jury to determine said classification.

SECTION 8. At the time and place mentioned in such notice, the county judge shall make a list of fifteen disinterested freeholders of the county, not of kin to any of the owners or occupants of said land described in said notice of appeal. Each party may object to five on such list, and if none of the commissioners be pres-

ent, the county judge shall strike off five names for the commissioners and shall thereupon issue a precept to the sheriff or any constable of said county, directing him to summon the five persons named in said list not objected to by the parties to meet at the time and place to be specified in said precept, to fix the classification of said land. At the time and place appointed for the appearance of said jury, they shall be sworn by the county judge, or by any officer authorized to administer oaths, justly and impartially to make such classification, and they shall examine the same and hear the allegations and testimony in opposition and support of the same and may, if they deem it necessary, visit the district and view the lands. If they find the tracts of land in question are marked too high or too low in the classification, they shall correct the errors, but if no injustice has been done, they shall confirm the classification as made by the commissioners, their final determination shall be made in writing and filed with the county clerk. The classification, when established, as hereinafter provided, shall be recorded with other papers in a book to be kept by the county clerk as the drainage record and shall be conclusive.

SECTION 9. The commissioners by resolution shall order such amount of moneys to be raised by special assessment upon the lands of the district as may be necessary and such amount shall be apportioned among the several tracts in the name of owner when known, according to acreage of each, and its figure of classification on the graduated scale, so that each tract may bear its equal burden in proportion to benefits. They shall make out a special assessment roll, hereinafter designated tax list, setting down in separate columns the owners' names, when known, and when unknown,

stating unknown, a description of the land, the number denoting the classification, the tax, the damages allowed if any, or any other credit to be given to the owner. The balance of tax over credits or of damages or other credits over the tax, showing the amount due to the district, by each land owner on the separate tracts, or, due to the land owner by the district, shall be set down in final columns. When completed, the list shall be filed with the county clerk.

SPECIAL ASSESSMENT TAX LIST.

Owner's name.	Description of Land.				No. classification on scale.	Tax levied.		Total credits.		Balance due district.		Balance due owners.		Remarks.
	Sec.	Tp.	R.	Ac's.		Dol.	Cts	Dol.	Cts	Dol.	Cts	Dol.	Cts	
.....	...	...	...	...	...	...	...	...	...	...	...	...	...	.....
.....	...	...	...	...	...	...	...	...	...	...	...	...	...	.....
.....	...	...	...	...	...	...	...	...	...	...	...	...	...	.....
.....	...	...	...	...	...	...	...	...	...	...	...	...	...	.....
.....	...	...	...	...	...	...	...	...	...	...	...	...	...	.....
.....	...	...	...	...	...	...	...	...	...	...	...	...	...	.....
.....	...	...	...	...	...	...	...	...	...	...	...	...	...	.....

SECTION 10. Any party against whose land a tax has thus been levied, may, within ten days after the list has been deposited with the county clerk, appeal as hereinafter provided, by filing a bond in double the amount of tax appealed from, in the county clerk's office, but the appeal shall be upon the ground only that such tax is a greater amount than the benefits to accrue to the lands in question by the proposed drainage, provided, that in any proceedings under this act, where the costs have been unnecessarily or improperly made such costs may be adjudged against the party making the same,

but the taking of any appeal by any person or persons, as herein provided, shall not operate to delay the collection of any tax from which no appeal has been taken, nor delay the progress of the work.

SECTION 11. When any person shall have been aggrieved by any decision of the commissioners awarding him damages on account of property taken or for the destruction or removal of any dam or the interference with any right of flowage or any other injury to real estate on account of said system of drainage by the imposition of any tax as provided in the next preceding section he may appeal from the action of the commissioners herein, as follows: Within ten days after the filing with the county court of the decision of the commissioners fixing any such damages or levying any tax as herein provided, he shall file with the county clerk a bond conditioned to pay all costs of said appeal, not exceeding the sum of two hundred and fifty dollars, said bond to be with security approved by the county clerk and a notice setting forth the land which is affected by said decision or action of said commissioners and the action of the commissioners with respect thereto, at which he is aggrieved. Said notice shall also specify the time and place in which said person will apply to the county judge of the said county for the drawing of a jury to assess said damages or establish said tax, as hereinafter provided. At the time and place mentioned in said notice, the county judge shall make a list of fifteen disinterested, resident freeholders of the county, not of kin to any of the owners or occupants of said lands described in said notice of appeal. Each party may object to five on said list and if none of the commissioners be present, the county judge shall strike off five names for the commissioners and shall

thereupon issue a precept to the sheriff or any constable commanding him to summon the five persons named in said list, not objected to by the parties to meet at the time and place to be specified in said precept, to appraise the damages sustained by the owner or owners appealing from the action of said commissioners as aforesaid. At the time and place appointed for the appearance of said jury, they shall be sworn by the county judge, justly and impartially to make such appraisal of damages or to determine such tax, and shall, if they deem necessary, proceed to view the premises in question and hear the statements and proposition of the parties, and they shall make their return of their appraisal to the county judge, which shall be certified by said judge, and filed with the county clerk, with the awards of the commissioners aforesaid, and if the amount of the appraisal by said jury shall exceed the amount awarded by the commissioners, or if said tax shall be decided in favor of said appellants, the costs and expenses shall be paid by the commissioners from the funds belonging to said drainage commission, otherwise by the appellant. Either the commissioners or the party aggrieved may appeal to the circuit court for Dane county, from the decision of said jury, taking such appeal in the same manner, with the same notice and affidavit as an appeal is taken from a judgment of a justice of the peace; but said appeal shall be brought to trial in the circuit court for Dane county and tried therein the same as any appeal cases from justices of the peace aforesaid, and shall thereafter be deemed an action pending in said circuit court, subject to all the rules of practice and to all the rights of appeal to the supreme court as shall pertain to actions in the circuit court, the

costs and expenses to follow the final determination of said appeal.

SECTION 12. The taking of any appeal by any person or persons as herein provided, shall not operate or delay the collection of any tax from which no appeal has been taken, nor delay the progress of the work.

SECTION 13. It shall be competent for the commissioners to order the tax to be paid in installments of such amounts and at such times as will be convenient for the accomplishment of the proposed work; otherwise, the whole amount of such tax shall be payable immediately upon such confirmation, and shall be a lien upon the lands assessed until paid; and such taxes shall draw interest at the rate of eight per cent. per annum from the time they shall become payable till they are paid, and such interest may be collected and enforced as part of the taxes.

SECTION 14. Immediately after the commissioners shall have filed their tax list, the county clerk shall make out and certify to the county treasurer a copy of said tax list; and the said county treasurer shall be, ex-officio, the treasurer of said drainage funds, and shall execute a bond to the state of Wisconsin for the use of all persons interested, in a sum not less than twice the amount of taxes levied, conditioned for the faithful performance of his duties as treasurer of said drainage district, and that he will faithfully account for all money that, by virtue of said office, shall come to his hands. Such bond shall be with such sureties as may be approved by the commissioners, and said bond shall be kept and preserved in the office of the county clerk. In case the said county treasurer shall fail to give such bond, as treasurer, the commissioners may appoint a treasurer, who shall be treasurer of said drainage dis-

trict until the said county treasurer or his successor, shall give such bond.

SECTION 26. For a failure to perform any of the duties imposed upon them by the provisions of this act, the commissioners so failing shall individually, upon complaint made under oath by any person who has paid a tax for the construction, maintenance or repair of such work, be liable to a fine not exceeding one hundred dollars, to be recovered in an action in the name of the state of Wisconsin, before any justice of the peace in the county, and all fines, when collected, shall be paid into the treasury of Dane county for the benefit of the school fund.

SECTION 28. Each of the commissioners provided for in this act shall receive three dollars per day for the time actually and necessarily employed in the discharge of the duties of his office. They shall make out their accounts under oath, and their accounts shall be presented to and allowed by the judge of the county court; and the amount allowed by the said court shall be paid out of the funds of the district for which the services were rendered, and a majority of said commissioners shall have power to act and decide upon all matters pertaining to said drainage proceedings. The treasurer and clerk shall receive for their services such sums as may be fixed by the commissioners, not to exceed three hundred dollars each for their services in any one year. All fees and allowances shall be paid out of the funds of the district.

SECTION 30. This act shall be liberally construed to promote the drainage and reclamation of the wet and overflowed lands in Dane county affected thereby, and in the preservation of the public health.

THE STATE EX REL. BALTZELL VS. STEWART, CIRCUIT JUDGE, ETC.

October 2—October 15, 1889.

DRAINAGE: CONSTITUTIONAL LAW. (1) *General or special law.* (2) *Granting corporate powers: Police power.* (3) *Determination of necessity of work.* (4) *Fixing limits of district.* (5) *Due process of law.*

1. Ch. 383, Laws of 1889, providing for the drainage and reclamation of certain lands in Dane county, is a special law.
2. Although said act provides for the appointment of a board of drainage commissioners with certain corporate powers for the carrying out of the proposed system of drainage, yet as the commissioners are to exercise under it a police power for the promotion of the public health and welfare, and that is the main purpose of the act, it does not contravene subd. 7, sec. 31, art. IV, Const., which prohibits the legislature from enacting any special or private law granting corporate powers or privileges except to cities.
3. The fact that the decision of the commissioners that the public health and welfare will be promoted by the proposed work is made final and conclusive upon that question, does not render the act invalid.
4. The lands to be drained being in Dane county, and the nature and extent of the proposed drainage being clearly indicated in the act, it is no objection to its validity that the commissioners are to determine what lands shall be drained and what lands shall be charged with assessments for doing the work.
5. An appeal to the courts from the decisions of the commissioners being given by the act, as to all material questions except the necessity of the proposed drainage, it cannot be said that property rights will be affected without due process of law.

CERTIORARI to the Judge of the Ninth Judicial Court.

Pursuant to ch. 383, laws of 1889, George E. Bryant and others presented to the said judge their petition for the appointment of drainage commissioners. Objections to such appointment were filed by James Robbins and John R. Baltzell, the relator, the owners of the dam and water-power at the outlet of Lake Mendota, and by the Stoughton Milling Co. After a hearing the

trict until the said county treasurer or his successor, shall give such bond.

SECTION 26. For a failure to perform any of the duties imposed upon them by the provisions of this act, the commissioners so failing shall individually, upon complaint made under oath by any person who has paid a tax for the construction, maintenance or repair of such work, be liable to a fine not exceeding one hundred dollars, to be recovered in an action in the name of the state of Wisconsin, before any justice of the peace in the county, and all fines, when collected, shall be paid into the treasury of Dane county for the benefit of the school fund.

SECTION 28. Each of the commissioners provided for in this act shall receive three dollars per day for the time actually and necessarily employed in the discharge of the duties of his office. They shall make out their accounts under oath, and their accounts shall be presented to and allowed by the judge of the county court; and the amount allowed by the said court shall be paid out of the funds of the district for which the services were rendered, and a majority of said commissioners shall have power to act and decide upon all matters pertaining to said drainage proceedings. The treasurer and clerk shall receive for their services such sums as may be fixed by the commissioners, not to exceed three hundred dollars each for their services in any one year. All fees and allowances shall be paid out of the funds of the district.

SECTION 30. This act shall be liberally construed to promote the drainage and reclamation of the wet and overflowed lands in Dane county affected thereby, and in the preservation of the public health.

THE STATE EX REL. BALTZELL VS. STEWART, CIRCUIT JUDGE, ETC.

October 2—October 15, 1889.

DRAINAGE: CONSTITUTIONAL LAW. (1) *General or special law.* (2) *Granting corporate powers: Police power.* (3) *Determination of necessity of work.* (4) *Fixing limits of district.* (5) *Due process of law.*

1. Ch. 383, Laws of 1889, providing for the drainage and reclamation of certain lands in Dane county, is a special law.
2. Although said act provides for the appointment of a board of drainage commissioners with certain corporate powers for the carrying out of the proposed system of drainage, yet as the commissioners are to exercise under it a police power for the promotion of the public health and welfare, and that is the main purpose of the act, it does not contravene subd. 7, sec. 31, art. IV, Const., which prohibits the legislature from enacting any special or private law granting corporate powers or privileges except to cities.
3. The fact that the decision of the commissioners that the public health and welfare will be promoted by the proposed work is made final and conclusive upon that question, does not render the act invalid.
4. The lands to be drained being in Dane county, and the nature and extent of the proposed drainage being clearly indicated in the act, it is no objection to its validity that the commissioners are to determine what lands shall be drained and what lands shall be charged with assessments for doing the work.
5. An appeal to the courts from the decisions of the commissioners being given by the act, as to all material questions except the necessity of the proposed drainage, it cannot be said that property rights will be affected without due process of law.

CERTIORARI to the Judge of the Ninth Judicial Court.

Pursuant to ch. 383, laws of 1889, George E. Bryant and others presented to the said judge their petition for the appointment of drainage commissioners. Objections to such appointment were filed by James Robbins and John R. Baltzell, the relator, the owners of the dam and water-power at the outlet of Lake Mendota, and by the Stoughton Milling Co. After a hearing the

court made an order appointing the commissioners, and to review such order a writ of certiorari was sued out.

S. U. Pinney and *A. L. Sanborn*, for the relator.

For the Stoughton Mill Co. there was a brief by *Luse & Wait*, and oral argument by *L. K. Luse*.

For the respondent there was a brief by *Rogers & Hall*, attorneys, and *H. W. Chynoweth*, of counsel, and oral argument by *W. H. Rogers* and *H. W. Chynoweth*.

COLE, C. J. This is a proceeding to reverse and set aside an order of the circuit court of Dane county appointing three drainage commissioners under ch. 383, laws of 1889. The validity of this act is challenged on several grounds. . . . . The law gives the commissioners, after hearing the parties in the matter who shall appear before them, power to decide whether the public health or welfare will be promoted by the intended work. A favorable decision by them of that question is conclusive. No appeal is granted for any further hearing on the question as to the necessity of the drainage. The law is vigorously assailed because it provides no appeal for the trial of that question. From the nature of the case, it would seem that there should be somebody to determine the question of the necessity of the drainage for the public benefit. Is each person whose land is affected by the drainage entitled to a jury trial of the issue? If so, one jury might find one way, another jury find another way, and a marsh which was the cause of sickness and death, and was really a nuisance, would never be drained. The legislature might have declared the marshes in this case a nuisance, and taken steps for draining them. The question of necessity could not have been inquired into except

where it was apparent that there was an attempt to evade the constitution and advance some scheme under the pretense of promoting the public health and welfare. In the case of a county drain the county board decides upon the necessity, and there is no appeal from the decision of the question. The principle involved is analogous to taking property by right of eminent domain. Where a municipal corporation takes property for public use the jury conclusively decides the question of necessity. The legislature may determine the necessity of the exercise of the power, and the extent to which the exercise of the power shall be carried, or it may delegate the exercise of that right to officers or corporations. "It is not indispensable that the legislature shall determine that any given enterprise is necessary and proper before putting in operation the power of eminent domain. This power is primarily an absolute one, and theoretically exists in this absolute form in the ultimate source of authority in every organized society. In the constituted government of this state the right of exercising it has been confided to the legislature, restricted by only two conditions; one that compensation shall be made to the owner of the property taken; the other, that the use for which the property may be taken shall be a public use. In other respects it is without limits. Whether the purpose to be subserved be necessary or wise is for the legislature alone. That body, also, must decide when or under what circumstances the occasion for its exercise arises; but whether the legislature will await the actual existence of the occasion before determining to employ its prerogative or will declare in advance what condition of things shall furnish the exigency for its agents to act,

is a question purely for legislative discretion." This language of the court of New Jersey in *National D. R. Co. vs. Cent. R. Co.*, 32 N. J. Eq., 755, 763, is applicable to the point we are considering. This doctrine is in accord with the views of all the authorities upon the subject, and was sanctioned by this court in *Smeaton vs. Martin*, 57 Wis., 364; *Smith vs. Gould*, 59 Wis., 631; and *Newcomb vs. Smith*, 2 Pin., 131. It is upon this principle of public benefit that not only the agents of the government but also individuals and corporations have been authorized to take or invade private property for the purpose of making highways, turnpike roads, and canals; of erecting and constructing wharves and basins; and of draining swamps and marshes. HUBBELL, J., in *Newcomb vs. Smith*. No distinction is perceived in the case of taking land for a drain or other public purpose, for sanitary grounds. This fact furnishes more cogent reasons for the legislature delegating the power of determining whether the necessity exists under the circumstances. It is obvious the question could never be determined by successive jury trials.

Another objection to the law is that it attempts to delegate to the commissioners the power of creating and defining districts for drainage purposes, which it is said belongs solely to the legislature. It is not apparent how the legislature could accurately define the boundary of the lands which should be drained, without more investigation than it has time to give such matters. As respondent's counsel say, the act does define the boundaries of the district; but it is left to the commissioners to determine what lands shall be drained and what lands shall be charged with assessments for doing the work. But the lands to be drained or reclaimed are in Dane county, and the nature and extent

of the proposed drainage are clearly indicated. In *Taegarden vs. Racine*, 56 Wis., 545, and *Dickson vs. Racine*, 61 Wis., 545, authority was given the common council to define the taxing district for local taxation; and it was held that the common council possesses pro hac vice the legislative power, whose action was as conclusive in the matter as if taken by the legislature itself. This is not like *People vs. Parks*, 58 Ca., 625. There it is said "the legislature has not, in any of the provisions of the act under consideratton designated any particular river, stream, or locality, within the state where drainage was necessary; nor located or established the boundaries of any drainage and assessment district within the limits of which taxes are to be levied, assessed, and collected for the purpose of raising funds to defray the cost and expenses of the system of works designated by the act." P. 641. The legislature could not well enter upon an inquiry of the lands which should be drained, but naturally referred that subject to the commissioners who could investigate the facts. The commissioners could determine what lands would be benefited by the work, and assess the burdens in proportion to the benefits received. We see no objection to this feature of the law. See Cooley on Taxation (2d ed.), 149, and cases cited in the notes.

It is further insisted that the act is void because it provides a method of drainage which affects property rights without giving the owner of the land the benefit of due process of law. The act gives an appeal from the decision of the commissioners in classifying the lands for assessment: from the amount of damages awarded for any land taken or injured; from the taxes and benefits apportioned, indeed from the decisions of all material questions which can arise, except from the

the decision as to the necessity of the drainage to promote the public health and welfare. We have stated some reasons for the conclusion that the act is not void for that feature in it. But upon the other questions the aggrieved party has an appeal. Under the circumstances it cannot be truthfully said that a person has had his property taken from him, or invaded, or burdens imposed upon it, without a hearing or due process of law.

The plain and declared object of the act is the promotion of the general health of the community and the public welfare by the execution of the proposed system of drainage and the improvement of waste land which will result therefrom. These manifest advantages and benefits, both public and private, would seem to fully justify its enactment. The validity and wisdom of such legislation has been amply vindicated by courts which have considered the subject, and no further remarks are called for upon the general questions.

As we perceive no valid objection to ch. 383, the order of the circuit judge appointing the drainage commissioners is affirmed, and the cause is remanded for further proceedings according to law.

By the court,— Ordered accordingly.

CASSODAY, J., dissents.